

# MILITARY LAW REVIEW

## Vol. 27

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GENERAL ORDER 100 REVISITED

*Captain James G. Garner*

THE PRESIDENT AND CONGRESS — OPERATIONAL  
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A COMPARISON OF THE TURKISH AND AMERICAN MILITARY  
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*First Lieutenant Hikmet Sener*

## PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

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# BRIGADIER GENERAL McKEE DUNN

## Judge Advocate General

(1875–1881)

The fifth Judge Advocate General of the United States Army was Brigadier General McKee Dunn who succeeded Brigadier General Joseph Holt in 1875.

General Dunn, a native of Hanover, Jefferson County, Indiana, received his college education at Indiana University. In 1835 he earned his A.M. from Yale University.

Upon completing his education, General Dunn entered the practice of law in Madison, Indiana, and later became an active participant in his state's politics. He represented his county in the state legislature and was a delegate to Indiana's State Constitutional Convention. In 1859 he entered the national political scene, serving as a representative from Indiana to the United States Congress. During the 37th Congress General Dunn acted as Chairman of the Congressional Committee on Patents.

With the commencement of the Civil War, in addition to his political responsibilities, he served from June to August 1861 as aide-de-camp to General McClellan. Congressional elections for the 38th Congress saw General Dunn lose his seat in the House, but President Lincoln, realizing him to be a capable leader, did not permit him to leave public life. The President appointed him a Judge Advocate in the expanding Judge Advocate General's Corps. In June 1864 General Dunn was appointed Assistant Judge Advocate General with rank of Lieutenant Colonel, and at the close of the War he was breveted a Brigadier General for faithful, meritorious, and distinguished service in his department.

After the War, Congress retained ten of the thirty wartime judge advocates and the offices of Judge Advocate General and Assistant Judge Advocate General, and General Dunn continued to serve as Assistant Judge Advocate General. General Dunn became The Judge Advocate General in 1875.

While in office, General Dunn was the author of *A Sketch of the History and Duties of the Judge Advocate General's Department, United States Army (1878)* which vividly portrayed the growth of the department from the Revolutionary period to 1875 and included a statistical appendix listing the various Congressional statutes affecting the department's strength.

By January 1881 General Dunn had completed eighteen years of service in the United States Army. He retired to Fairfax County, Virginia, where he lived until his death in 1887.

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# GENERAL ORDER 100 REVISITED\*

BY CAPTAIN JAMES G. GARNER\*+

## I. INTRODUCTIOK

### A. WHY STUDY THE LAWS OF LAND WARFARE?

1963 was the one hundredth anniversary of the first codification of a body of humanitarian rules governing land warfare. This document was the *Instructions for the Government of the Armies of the United States in the Field*, General Orders No. 100, April 24, 1863, popularly called the "Lieber Code" after its author, Dr. Francis Lieber.

The average man on the street, one hundred years later, upon hearing the phrase, "law of land warfare," usually has a comment somewhat to this effect: "There is no such thing." Unfortunately, during the last forty years or so, shades of this sentiment have been shared by many scholars, lecturers, and others interested in the field of international affairs and international law. Among these people, the reactions have ranged from an opinion that the age of total war has arrived and, as a consequence, the traditional usages and customs have been wiped out, to the idealistic opinion that war has been outlawed by international treaty and any consideration of the laws of war is "war mongering" and, therefore, is a subject to be shunned.<sup>1</sup>

Realistically speaking, neither of these extreme viewpoints is truly valid. Certainly total war with all of its horrible attendant implications is possible and its spectre haunts all of us. However, with the magnitude of destruction which is possible with nuclear weapons, many strategists have concluded that, as things presently stand, the East and the West have reached a situation of mutual nuclear deterrence.<sup>2</sup> This has led to the theory that we face an era of conflicts somewhat short of total

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\* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Twelfth Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

\*\* JAGC, U.S. Army; Chief of Military Justice, Office of the Staff Judge Advocate, U.S. Army Area Command, Garrison, Frankfurt, Germany; B.S., 1953, University of Texas; LL.B., 1955, University of Texas; admitted to practice in the State of Texas and before the United States Supreme Court and United States Court of Military Appeals.

<sup>1</sup> See Kuna, *The Chaotic Status of the Laws of War*, 45 AM. J. INT'L L. 37 (1951).

<sup>2</sup> See generally OSGOOD, LIMITED WAR (1957); MAXWELL D. TAYLOR, THE UNCERTAIN TRUMPET (1959).

nuclear war. This may range from a limited war<sup>3</sup> of large proportions, perhaps using tactical nuclear weapons, to an armed conflict of less than international character, of which there can be a limitless variety, both in nature and in scope.

It is believed that in any conflict short of total war, and in total war itself, humanity dictates the necessity for some body of rules to protect the helpless, alleviate unnecessary suffering, avoid unnecessary devastation, and ease the transition to peace. Therefore, in an era of limited war and persistent fears of total war, it is most fitting to revisit General Orders No. 100 to see where the path of the time has taken the rules of land warfare and perhaps to chart a course for the future.

In 1913, on the 50th anniversary of the Lieber Code, Elihu Root chose Francis Lieber as the subject of the opening address he gave as President of the American Society of International Law at their seventh annual meeting in Washington.<sup>4</sup> At that time, shortly before the world was first plunged into the total war of modern times and before the great advent of unsighted weapons, Root was lyrical as he extolled the virtues of Lieber's Code, which stood almost unquestioned at that time." It had been the basis and inspiration for the Brussels Declaration of 1874 which, although it did not become effective, served as the foundation for the Hague Conventions of 1899 and 1907.<sup>5</sup> This article will examine the Lieber Code once again and attempt to ascertain just how far the law of land warfare has progressed during the fifty years since Root pointed to the Lieber Code as the ultimate work in the field.

To understand the Lieber Code and the factors which influenced it, we must first look at the author himself and at his background.

### B. THE LIFE OF FRANCIS LIEBER

Francis Lieber was born in Berlin on March 18, 1800. These were the times when, inspired by the French Revolution and the declaration of the rights of men, a conception of popular liberty and a strong desire to attain it had spread throughout Europe. Under the iron hand of their autocratic government, the Prussian people became restive, and during

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<sup>3</sup> A term which has been variously defined.

<sup>4</sup> See Root, *Francis Lieber*, 7 AM. J. INT'L L. 453 (1913).

<sup>5</sup> "The definitions are clear, the injunctions and prohibitions distinct and unambiguous, and, while the instrument was a practical presentation of what the laws and usages of war were, and not a technical discussion of what the writer thought they ought to be, in all its parts may be discerned an instinctive selection of the best and most humane practice and an assertion of the control of morals to the limit permitted by the dreadful business in which the rules were to be applied." Root, *supra*, note 4, at 456.

<sup>6</sup> JAMES W. GARSER, RECENT DEVELOPMENTS IN INTERNATIONAL LAW 725 (1925).

the early part of his life, Lieber's homeland became a center of political reaction.

In his early childhood, Lieber witnessed Napoleon's entry into Berlin after the victory of Jena. When he was fifteen he enlisted in the Colberg regiment and set out to aid in the resistance to Napoleon, then recently returned from his exile on Elba. He fought at Ligny and under Blucher at Waterloo. He was seriously wounded by a French ball at the Battle of Namur, and as Root put it, "had the strange and vital discipline of lying long on the battlefield in expectation of death,"<sup>7</sup> He was evacuated to Liege and returned home after a long convalescence.

Following the Napoleonic Wars, Lieber became involved in a liberal patriotic society and was imprisoned for four months. He was nineteen years of age at this time. Because of his political views, he was excluded from all German universities, except Jena, where he received his Doctor of Philosophy degree in **1820**. He then had to leave Jena but pursued further studies at Halle and Dresden. At the age of twenty-one, he and a group of other young Germans, fired with enthusiasm by the resistance of the Greeks to Turkish rule, went to Greece in an unavailing attempt to aid in the Greek War of Independence.

From Greece, Lieber made his way to Italy where he became a tutor in the household of Barthold George Niebuhr, then Prussian Ambassador. Niebuhr aided him in returning to Berlin. However, his expedition to Greece convinced the police that, indeed, Lieber was politically dangerous. Again he was arrested, but Niebuhr interceded for him and obtained his release. In May of **1826**, Lieber left Germany and went to London. Of this point in Lieber's life, Baxter has this observation:

Thus, by his twenty-sixth year, Lieber had engaged in two wars, had received his doctorate at Jena, had acquired a healthy distaste for the police of his native Prussia, and had voluntarily expatriated himself. If, as seems not unreasonable, he who is to write of war must first experience it, this much of Lieber's qualifications as a codifier of the Law of war had been established. The thinking and writing were to come later.<sup>8</sup>

A year later, Lieber came to the United States and accepted a position as director of the Boston gymnasium. Shortly after his arrival he became a naturalized American citizen. He devised a plan for the publication of an encyclopedia, became its editor, and in **1829** the publication of the *Encyclopedza Americana* began. Through the many contacts that he made in this capacity, he became Professor of History and Political Economy at South Carolina College.<sup>9</sup> He remained there for twenty-two

<sup>7</sup> Root, *supra* note 4, at 459.

<sup>8</sup> Baxter, *The First Modern Codification of the Law of Land Warfare* 3 (reprinted from the *International Review of the Red Cross*, Supp 1953).

<sup>9</sup> Now the University of South Carolina.

years but apparently enjoyed the opportunity of visiting his friends in Boston and New York nearly every summer. In 1857 he became Professor of Modern History and Political Science at Columbia Law School where he taught International Law and Civil and Common Law until his death on October 2, 1872.

In addition to his *Encyclopedia Americana*, Lieber's pre-Civil War reputation was also enhanced by his *Political Ethics* in two volumes (1838) and his book, *Civil Liberty and Self Government* (1853). Ideas expressed in *Political Ethics* form much of the basis for the Lieber Code,

Lieber's three sons fought in the American Civil War. Oscar Montgomery Lieber died of wounds received fighting as a Confederate soldier. Hamilton Lieber lost an arm at Fort Donelson, fighting for the North. Guido Norman Lieber was an infantryman in the Union Army. Later, as a Brigadier General, this son was to become The Judge Advocate General of the United States Army during the Spanish-American War.<sup>10</sup>

### C. THE WRITING OF THE LIEBER CODE

By the end of 1862, the Civil War had become one of the greatest conflicts in history. Large armies, composed for the most part of untrained volunteers and commanded often by officers who lacked familiarity with the established customary rules of war, had been put into the field. Many questions concerning the rights and duties of field commanders as well as individual soldiers were constantly arising. Also, the matter of treatment of combatants and noncombatants was in controversy.<sup>11</sup> Under these circumstances, it became manifest that there was a need for a body of written rules defining the rights and duties of commanders as well as those of the inhabitants of the war-torn country. There were few treatises in the field of international law and the average Union officer or enlisted man was very unlikely to be acquainted with any of them.<sup>12</sup>

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<sup>10</sup> The biographical material utilized came from several sources. Among them are **THE LIFE AND LETTERS OF FRANCIS LIEBER** (Perry ed. 1882); Baxter, *supra* note 8; Root, *supra* note 4; and Shepard, *One Hundredth Anniversary of the Lieber Code*. 21 MIL. L. REV. 157 (July 1963).

<sup>11</sup> GARNER, *op. cit. supra* note 6, at 723.

<sup>12</sup> Among the available works were HALLECK, **INTERNATIONAL LAW** (1861); KENT, **COMMENTARIES ON AMERICAN LAW** (10th ed. 1860); VATTEL, **THE LAW OF NATIONS** (Chitty ed., 1858); and WHEATON, **ELEMENTS OF INTERNATIONAL LAW** (6th ed., Lawrence, 1857).

## GENERAL ORDER 100

These were the circumstances that led President Lincoln to direct that a board be appointed to draft a set of rules for the Union armies to use in its struggle with the Confederacy.<sup>13</sup>

Secretary of War Stanton, by an order dated December 17, 1862, appointed a board “to propose amendments or changes in the rules and articles of war and a code of regulations for the government of armies in the field as authorized by the laws and usages of war.”<sup>14</sup> The members of this five-man board were Francis Lieber, LL.D., General Hitchcock (president of the board), and Generals Cadwalader, Hartsuff and Martindale. The task of preparing the code of regulations was given to Dr. Lieber.<sup>15</sup>

Lieber, drawing upon his years of thought and study, quickly prepared a draft and presented it to the other members of the board. After some additions and deletions by the officers on the board, Lieber then transmitted a revised draft to General Halleck on February 20, 1863, just two months after the board was appointed,

President Lincoln approved the project and it was issued as the Instructions for the Government of the Armies of *the* United States *in* the Field, General Orders No. 100, dated April 24, 1863.<sup>16</sup>

The example set by the United States in issuing the Instructions was followed by several European nations. Many ordinances or manuals, along the general lines of the Lieber Code, were promulgated. In 1871 the Government of the Netherlands issued a manual entitled “Practical Manual of the Laws of War.” It was prepared by General den Beer Poortugael, and the government, without directly sanctioning the manual, ordered that it should be used as a textbook for the instruction of officers. The French Government followed suit in 1877,<sup>17</sup> as did the Swiss Government in 1878, Serbia in 1879, Spain in 1882, Portugal in 1890, and Italy in 1896.<sup>18</sup>

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<sup>13</sup> This project, of course, was urged by Lieber with the backing of General Henry Halleck, then General-in-Chief of the Union Armies, and himself the author of a work in the field of international law.

<sup>14</sup> Special Orders No. 399. Series of 1882.

<sup>15</sup> Root, *supra* note 4, at 454.

<sup>16</sup> Hereinafter referred to as the “Lieber Code” or the *Instructions* and cited as Lieber, art —.

<sup>17</sup> *MANUAL DE DROIT INTERNATIONAL A L’USAGE DES OFFICERS D L’ARMÉE DE TERRE* (Prepared by M. Billot, 3d ed. Paris, 1884).

<sup>18</sup> The character of some of these early manuals is discussed in HOLLAND, *STUDIES IN INTERNATIONAL LAW* (1898), at Chapter 4.

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### II. ANALYSIS OF THE LIEBER CODE A. SCOPE AND METHOD OF ANALYSIS

#### 1. Organization.

The *Instructions* contain ten sections, which are subdivided into one hundred and fifty-seven articles. The scope of this document ranges from "martial law" to detailed rules regarding prisoners of war.<sup>19</sup>

In this article the Lieber Code will not be analyzed according to the order or arrangement of the original General Order No. 100. Instead, for the most part, it will be broken down into fairly broad topics forming the framework of Lieber's definition of military necessity and its limitations on permissible actions in land warfare. This topic arrangement is more consistent with that used in most contemporary treatises. In order to limit the length of this study, certain articles of the Code dealing with the treatment, of prisoners of war, occupation and non-hostile relations are not discussed. Excluded are his topics "Martial Law," "Military Jurisdiction,"<sup>20</sup> most of Section VI, Section VIII, and various other articles scattered throughout the Code. Included, however, is his treatment of "war treason" and "war rebels." Also not discussed are articles which are dated, such as those dealing with slavery and those having an obvious relationship chiefly to the situation during the American Civil War.

#### 2. Basic Premises.

The Lieber Code fulfilled a dual purpose. It was both a short textbook on the law of war and a set of rules for field commanders. This dual function accounts for the fact that the Code vacillates between diffuseness and economy of language, is sometimes directory and sometimes hortatory. These characteristics are particularly noticeable in the first section of the Code, where many of the articles are drawn in gen-

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<sup>19</sup> The titles of the ten sections of the Code are as follows:

- I. Martial Law—Military Jurisdiction—Military Necessity—Retaliation
- II. Public and Private Property of *the* Enemy—Protection of Persons, and Especially of Women; of Religion, the Arts and Sciences—Punishment of Crimes Against the Inhabitants of Hostile Countries
- III. Deserters—Prisoners of War—Hostages—Booty on the Battlefield
- IV. Partisans—Armed Enemies not Belonging to the Hostile Army—Scouts—Armed Prowlers—War Rebels
- V. Safe-Conduct—Spies—War-Traitors—Captured Messengers
- VI. Exchange of Prisoners—Flags of Truce—Abuse of the Flag of Truce—Flags of Protection
- VII. The Parole
- VIII. Armistice—Capitulation
- IX. Assassination
- X. Insurrection—Civil War—Rebellion

<sup>20</sup> Lieber, arts. 1-13.

eral terms, as if they were establishing the premises for a logical system.<sup>21</sup>

Thus, Lieber sets out some basic principles as an introduction to the theoretical basis of the law of war. “Public war” is defined as “a state of armed hostility between sovereign nations or governments.”<sup>22</sup> In this then is the implication that the Code was designed for international conflicts and not just for the American Civil War. It is stated that in a civilized existence men live together as nations, “(whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.”<sup>23</sup> From this it is concluded that in war, the citizen of a hostile country, as one of its constituents, is an enemy, subject to the hardships of war.<sup>24</sup>

Lieber states that there are many great nations “in close intercourse” and that “peace is their normal condition; war is the exception.” He says that “the ultimate object of all modern war is a renewed state of peace,” and that it is better for humanity if wars are more vigorous, because “sharp wars are brief.”<sup>25</sup>

War is not its own end, according to Lieber, but is the “means to obtain the great ends of state,<sup>26</sup> or to consist in defense against wrong.”<sup>27</sup>

His jurisprudential theory of the laws of land warfare is brief. “All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.”<sup>28</sup> He says further that there is no law or authoritative rules of action between hostile armies, “except that branch of the law of nature and nations which is called the law and usages of war on land,”<sup>29</sup> and this law of war imposes its limitations and restrictions

<sup>21</sup> These characteristics were also noticed by Baxter. *supra* note 8. at 20.

<sup>22</sup> Lieber, art. 20.

<sup>23</sup> *Ibid.*

<sup>24</sup> Lieber, art. 21.

<sup>25</sup> Lieber, art. 29. It is interesting to compare this statement with that made by Hindenburg on the eastern front during World War I: “The more brutal the conduct of war, the more charitable it really is, for the sooner it will be ended.” 7 LITERARY DIGEST OF WORLD WAR I, at 89 (1919).

<sup>26</sup> (Footnote added.) Carl von Clausewitz expressed a similar view when he wrote, “War is nothing but a continuation of political intercourse by other means.” VON CLAUSEWITZ, ON WAR 16 (Jolles transl. 1943).

<sup>27</sup> Lieber, art. 30.

<sup>28</sup> Lieber, art. 41. Here Lieber makes a place for international law. His view is consistent with contemporary practice.

<sup>29</sup> Lieber, art. 40. About the only international instrument prior to Lieber’s time which gave force of execution to an extensive set of regulations in the event of conflict was the 1785 Treaty between Prussia and the United States. This was only a bilateral convention, however.

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“on principles of justice, faith, and honor.”<sup>30</sup> Custom, not convention, contained the rules at the time Lieber was writing.<sup>31</sup>

In these basic premises war is placed within the framework of the nation-state system. The expressed desire for peace is still very pertinent. The obviously Teutonic concept of the desirability of a hard, quick war must be rejected because the quick nuclear war would mean only more suffering and devastation and perhaps the extinction of humanity. However, the law of war does not prohibit the hard, quick war.

The Kellogg-Briand Pact (Pact of Paris 1920) repudiated Lieber's idea that war is the ‘(means to obtain the great ends of state’<sup>32</sup> in that war was renounced as an instrument of national policy. However, the defensive war<sup>33</sup> is permitted both by the Kellogg-Briand Pact and by the charter of the United Nations.

Going beyond these premises and looking to the rules themselves, it is clear from an *over-all* study of the Lieber Code that the development of the law of war has been determined by three principles: first, the principle that a belligerent is justified in applying those measures not prohibited by international law necessary to carry out the purposes of the war as soon as possible; secondly, the principle of humanity which prohibits measures of violence not necessary to secure the ends of the war; and, thirdly, the principle of chivalry, which requires a certain amount of reciprocal fairness between the opposing forces. The first of these principles involves the concept of “military necessity.”

### 3. *Military Necessity.*

The three articles which discuss military necessity<sup>34</sup> set out Lieber's theory regarding the permissible limits of land warfare. In this discussion, he outlines a framework upon which the main sections of his code are developed. Military necessity is briefly defined in Article 14 as “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.” This definition is carried forward today in the definition contained in the United States manual on land warfare<sup>35</sup> which defines military necessity as “[the] principle which justifies those measures

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<sup>30</sup> Lieber, art. 30.

<sup>31</sup> Other basic premises of the Lieber Code are interspersed with the substantive rules of land warfare and are discussed in that manner.

<sup>32</sup> Lieber, art. 30.

<sup>33</sup> *Ibid.*

<sup>34</sup> Lieber, arts. 14-16.

<sup>35</sup> U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter cited as FM 27-10].

not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.” The chief change is that the definition now has a total war overtone in that it speaks of the ends of war as the “complete submission of the enemy as soon as possible” and Lieber merely speaks of the ends of the war, which we soon determine from the code to be “to obtain the great ends of the state”<sup>36</sup> and a “renewed state of peace.”<sup>37</sup> Following the definition, the outer limits of military necessity are drawn. Military necessity allows only the direct destruction of the life and limb of **armed** enemies and of those others whose death or injury is unavoidable in the course of **battle**.<sup>38</sup> It allows the capture of armed enemies, people of importance to the enemy<sup>39</sup> and people of peculiar danger to the captor (undoubtedly referring to spies and saboteurs). Military necessity allows all destruction of property<sup>40</sup> and obstruction of the ways and channels of traffic, transportation, and communication. It allows all withholding of sustenance or means of life from the **enemy**.<sup>41</sup> It allows the appropriation of any property necessary for the subsistence or safety of the army, Lieber then states that military necessity allows such deception as does not involve the breaking of good faith (1) regarding pre-war agreements, or (2) regarding the commonly accepted rules of warfare.

Then Lieber sets out one of his primary philosophical assumptions upon which the entire code is based:

Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.<sup>42</sup>

In Article 16 the outline of the outer limits of warfare as permitted by military necessity continues. It does not admit of (1) cruelty, which is defined as the infliction of suffering for the sake of suffering or for revenge, (2) maiming or wounding except in battle, or (3) torture to extort confessions. The use of poison is cited as being beyond the permissible limits.<sup>43</sup> Then Lieber tempers his earlier statement concerning the destruction of property by making it clear that military necessity does not permit *wanton* devastation of an area. He reiterates the permissible use of deception, but condemns acts of perfidy.<sup>44</sup> This article is also concluded with a basic premise upon which the Code is based,

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<sup>36</sup> Lieber, art. 30.

<sup>37</sup> Lieber, art. 29.

<sup>38</sup> See also Lieber, art. 68.

<sup>39</sup> See pp. 23–25 *infra*.

<sup>40</sup> In later articles he withdraws from this harsh general statement.

<sup>41</sup> See Lieber, art. 17, and other articles on destroying crops, etc.

<sup>42</sup> Lieber, art. 15.

<sup>43</sup> See Lieber, art. 70.

<sup>44</sup> See pp. 10–12 *infra*.

“military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.”<sup>45</sup> This is one of the three fundamental purposes of the law of war as set out by the field manuals of both the United States Army and the British Army.<sup>46</sup>

During the period of warfare in which Lieber was writing, a foremost principle upon which the rules of land warfare were based was that a distinction must be made between combatants and noncombatants and that the forces of war should be directed, insofar as possible, to the former category and that the latter category is to be protected as much as possible. It is the tendency toward extinguishment of this distinction in total war<sup>47</sup> that has caused many writers to state that total war has wiped out the rules of land warfare or made them obsolete.<sup>48</sup> Lieber’s Articles 22 through 25 are devoted to making the distinction between noncombatant individuals belonging to the hostile country and the hostile country itself, with its men in arms (assimilating the army to the country). Lieber says, in effect, that the making of this distinction is an attribute of civilization and that the absence of the distinction is barbarian. However, he admits that under this test, civilization is still not universal.

At this point it may be appropriate to see how Lieber elaborated upon this framework of “military necessity” in setting out rules to govern hostilities.

### *B. UNCONVENTIONAL WARFARE*

#### *1. Ruses of War.*<sup>49</sup>

In Article 16, one of the propositions set forth by Lieber is that military necessity “admits of deception,<sup>50</sup> but disclaims acts of perfidy.” A contemporary work in the field of international law agrees with Lieber in this respect and contains the statement that Halleck<sup>51</sup> correctly formulates the distinction between stratagems and perfidy by laying down the principle that, whenever a belligerent has expressly

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<sup>45</sup> Lieber, art. 16.

<sup>46</sup> FM 27-10, para. 2c; THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW [hereinafter referred to as BRITISH MANUAL] para. 3 (The War Office, United Kingdom, 1958)

<sup>47</sup> MORGENTHAU, *POLITICS AMONG NATIONS* 287-301 (1953).

<sup>48</sup> See Kuns, *The Chaotic Status of the Laws of War*, 45 AM. J. INT’L L. 37 (1951).

<sup>49</sup> “Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.” Article 24, Annex to Hague Convention No. IV, Embodying the Regulations Respecting the Laws and Customs of War on Land (Oct. 18, 1907), 36 Stat. 2295, Feb. 23, 1909, T.S. No. 539 (effective Jan. 26, 1910) [hereinafter cited as HR].

<sup>50</sup> Meaning ruses or stratagems (footnote added).

<sup>51</sup> Who, of course, was Lieber’s highly respected friend.

or tacitly engaged, and is therefore bound by a moral obligation, to speak the truth to an enemy, it is perfidy to betray his confidence because it constitutes a breach of good faith.<sup>52</sup> Lieber never defines perfidy, nor does he define ruses or stratagems. However, a study of several scattered articles reveals his conception of these terms.

In an article that comes fairly late in the Code, ruses and perfidy are discussed, although not in those terms:

While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.<sup>53</sup>

Throughout the Lieber Code, death is always referred to as the punishment for perfidy.

Turning to the matter of different kinds of ruses or stratagems, the use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in *battle*, is labeled as an act of perfidy. It is stated further that this act causes the perpetrator to lose all claim to the protection of the laws of war.<sup>54</sup> Also, it is added that troops who *fight* in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.<sup>55</sup> Current theory and practice are unanimous in prohibiting the use of the national flag, the military ensigns, and the uniform of the enemy during actual attack and defense, since the principle that during actual fighting opposing forces ought to be certain who is friend and who is foe is considered inviolable.<sup>56</sup> However, many writers maintain that belligerent forces may make use of these means of deception until the actual fighting begins.<sup>57</sup> Article 23(f) of the Hague Regulations of 1907 prohibits the *improper* use of flags of truce, national flags, military insignia and enemy uniforms, as well as the distinctive badges of the Geneva Convention. This is not an unqualified

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<sup>52</sup> 2 OPPENHEIM, *INTERNATIONAL LAW* 430 (7th ed., Lauterpacht ed. 1952). Stone calls the definition "fanciful." STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 561 (1959).

<sup>53</sup> Lieber, art. 101.

<sup>54</sup> Lieber, art. 65.

<sup>55</sup> Lieber, art. 63. In Article 64, Lieber states that if a train is captured (surely this is not a firm limitation) containing enemy uniforms, and the American commander thinks it necessary for his men to use them, "some striking mark or sign must be adopted to distinguish the American soldier from the enemy." See also a similar provision in the *BRITISH MANUAL* para. 322. See also 2 OPPENHEIM, *op. cit.* supra note 52, at 429-30.

<sup>56</sup> 2 OPPENHEIM, *op. cit.* supra note 52, at 429.

<sup>57</sup> *Ibid.*, citing HALL, § 187, BLUNTSCHLI, § 565, TAYLOR, § 488, CALVO, iv. No. 2106, and others. See also *BRITISH MANUAL* paras. 320-21; FM 27-10, paras. 52, 54.

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limitation, but merely a prohibition of *improper* use. It leaves an open question as to what uses are proper and what are improper.

Some support for the view that it is permissible to wear the enemy uniform before the actual battle may be found in the *Skorzeny* Trial. In that case a number of Germans were captured wearing American uniforms over which German parachute overalls had been hastily donned. They were acquitted because there was no evidence that they had used their weapons while disguised in American uniforms and it also appeared that Skorzeny had previously sought an opinion which had advised against opening fire or committing hostile acts while in the American uniforms.<sup>58</sup>

The contemporary conventional rule is stated in Article 24 of the 1907 Hague Regulations which provides as follows:

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

A general statement of today's view is that ruses of war are permissible if they do not take advantage of the protection afforded by another law of warfare.<sup>59</sup> The examples used to demonstrate the principle in the Lieber Code are consistent with current practice. The absence of a definition as such renders true comparison difficult.

Measures to obtain information and ruses, because of the clandestine nature of both, are linked in the Hague Regulations. The usual clandestine means to obtain information is through espionage and the use of spies.

### 2. Spies and Espionage.

Lieber deals with the subject of spies in three separate articles.<sup>60</sup> In Article 88 a spy is defined as "a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy." In the same article the punishment of a spy is stated as death by hanging by the neck and that this punishment is applicable whether or not the spy succeeds in obtaining the information or in conveying it to the enemy.<sup>61</sup> As defined in this article, there is apparently no limitation as to locale of operations. This is in contrast with the first paragraph of Article 29 of the 1907 Hague Regulations which states that a person may be considered a spy ('when, acting clandestinely or on false pretenses, he obtains or endeavors to

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<sup>58</sup> Trial of Otto Skorzeny and Others, 9 United Nations War Crimes Commission. Law Reports of Trials of War Criminals 90-94 (1949).

<sup>59</sup> See SPAIGHT, AIR POWER AND WAR RIGHTS 169, 170 (3d ed. 1947).

<sup>60</sup> Lieber, arts. 83, 88, and 104.

<sup>61</sup> Lieber's language is reflected in FM 27-10, para. 78b.

obtain information *in the zone of operations of a belligerent*, with the intention of communicating it to the hostile party.”<sup>62</sup> FM 27-10 points out that the first paragraph of the Hague Regulation has been somewhat modified insofar as American practice is concerned by the enactment of Article 106 of the *Uniform Code of Military Justice*.<sup>63</sup> FM 27-10 further directs that insofar as the Hague Regulation and Article 106, UCMJ, are not in conflict, they will be construed and applied together. Otherwise Article 106, UCMJ, will govern American practice.<sup>64</sup> The British Manual in paragraph 327 states a broad definition which is very similar to Lieber's definition<sup>65</sup> in that no mention is made of the zone of operations. The British Manual then cites Hague Rule 29, and points out that an agent or spy who operates in neutral territories by sending information to one of the belligerents is not a spy within the meaning of the Hague Regulations and gives the example of a spy operating in Tangier during World War II by observing allied ship movements and communicating this information to one of the Axis nations. The comment concludes by pointing out that such an act may not amount to espionage by the law of war, although it may be so by the domestic law of certain nations. Such an act apparently *would* amount to espionage under the Lieber Code since it contains no limitation as to the locale of operations.

Earlier in the Code, Lieber had provided that if scouts, or individual soldiers, disguised in the dress of the country, or in the uniform of the army hostile to their own, are found within or lurking around the lines attempting to obtain information, they are treated as spies. He states that they shall suffer death.<sup>66</sup> The Hague Regulations of 1907<sup>67</sup> clarify this principle by stating it in the converse: that soldiers *not* in disguise, penetrating the zone of operations seeking information only, are *not* spies.<sup>68</sup>

In both Article 83 and Article 88, Lieber states that spies are punishable by death, but makes no mention of trial for spies. However, it was the practice of both the Union and the Confederacy to try spies.<sup>69</sup> To avoid possible abuses it was specifically provided in Article 30 of

<sup>62</sup> HR, art. 29 (emphasis added).

<sup>63</sup> Hereinafter cited as UCMJ.

<sup>64</sup> FM 27-10, paras. 75b and c.

<sup>65</sup> Lieber, art. 88.

<sup>66</sup> Lieber, art. 83.

<sup>67</sup> HR, art. 29.

<sup>68</sup> See also BRITISH MANUAL para. 329.

<sup>69</sup> KANE, SPIES FOR THE BLUE AND GRAY (1954). See also DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL 360-61 (Winthrop ed. 1868).

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the Hague Regulations of 1907 that "a spy taken in the act shall not be punished without previous trial."<sup>70</sup>

Lieber set out the rule, which is still accepted, that a successful spy (and he adds "or war traitor") who after safely rejoining his own army, is captured by the enemy, is immune from punishment for his acts as a spy (or war traitor).<sup>71</sup>

Looking at the present law and comparing it with the Lieber Code reveals almost no real change in the rules governing spies and espionage. On the other hand there has been a big change in espionage efforts of the major powers. Peacetime espionage has become "big business" involving the expenditure of millions. The Hague Regulations of 1907 apply only in time of war, and modern nations seem satisfied to leave peacetime espionage unregulated by international legislation.

The territorial qualification inserted in the 1907 Hague Regulations has not prevented a belligerent from punishing those who commit acts of espionage in other areas. The nebulous term "war treason" is generally used to describe, among other things, acts of espionage committed outside the zone of operations of a belligerent.<sup>72</sup> This, then, brings us to a discussion of "war treason" under the Lieber Code.

### 3. War Treason.

The term "war treason" in the sense in which it is now understood in international law was first used in the Lieber Code.<sup>73</sup> Lieber's Article 90 contained his basic definition of war treason:

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<sup>70</sup> See FM 27-10, para. 78a; BRITISH MANUAL para. 334. See also Article 5(21) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. & O.I.A. 3115, T.I.A.S. No. 3365 (effective Feb. 2, 1956) [hereinafter cited as GCC]; Trial of Rohde and Others (Satzweiler Trial), 5 United Nations War Crimes Commission? Law Reports of Trials of War Criminals 54 (1948) (accused found guilty of executing, without trial, four British women sent to France in plain clothes to assist British liaison officers working with French resistance movement).

<sup>71</sup> Lieber, art. 104; FM 27-10, para. 78c. The view is held that because of the wording of the Hague Regulation this immunity applies only to spies who belong to the armed forces of the enemy and that civilians who act as spies and are captured later may be punished. KEITH, WHEATON, INTERNATIONAL LAW, WAR 220 (1944); 2 OPPENHEIM, *op. cit. supra* note 52, at 424; U.S. DEP'T OF ARMY PAMPHLET No. 27-161-2, 2 INTERNATIONAL LAW 60 (1962). The view that both soldiers and civilians fall within the protection of Hague Regulation 31 is expressed in the BRITISH MANUAL para. 335.

<sup>72</sup> U.S. DEP'T OF ARMY PAMPHLET 27-161-2, 2 INTERNATIONAL LAW 59 (1962), citing KEITH, *op. cit. supra* note 71, and 2 OPPENHEIM, *op. cit. supra* note 52, at 425.

<sup>73</sup> Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BRIT. YB. INT'L L. 24445 (1950). This article contains an excellent detailed discussion of Lieber's development of the concept.

A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

As was usual, Lieber includes information relative to the punishment which might be imposed. It was provided that the punishment for the war traitor is always severe, and if it involves betrayal of information concerning the "condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death."<sup>74</sup> The offenses encompassed in the term war treason are spelled out in several other articles of the Lieber Code. If the inhabitant of an occupied area gives information to his own government or army, he is a war traitor.<sup>75</sup> Conversely, voluntary service as a guide to the enemy by "a citizen of a hostile and invaded district" is also deemed to be war treason.<sup>76</sup> Article 98 characterizes "all unauthorized or secret communication with the enemy" as "treasonable by the law of war," and Article 104, refers to the war traitor who has "safely returned to his own army." The logical conclusion from a study of all these articles is that the offense of "war treason" under Lieber's view could take place only in occupied or invaded territory.<sup>77</sup> In summary, under the concept of the Lieber Code, the war traitor is a civilian inhabitant of occupied territory who gives information to, or holds intercourse with the enemy. The war traitor is not to be confused with the war rebel (later discussed) who is a civilian inhabitant of occupied territory who commits hostile acts against the occupying power, or with the spy who acts clandestinely or under false pretenses in committing acts of espionage.

This distinction has not been so clearly drawn in international law outside of the Lieber Code. The term has been very loosely used to encompass hostile acts as well as the conveying of intelligence or information.<sup>78</sup> It is clear, however, that enemy soldiers, unlike private individuals, may be punished for such acts only when they commit them within an enemy's lines while in disguise.<sup>79</sup>

Today the term "war treason" and its concept has fallen into disuse. The term does not appear at all in the 159 articles of the 1949 Geneva

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<sup>74</sup> Lieber, art. 91.

<sup>75</sup> Lieber, art. 92.

<sup>76</sup> Lieber, art. 95. It seems that the misleading of the enemy by guides is also "war treason," because although Article 97, dealing with guides who mislead, does not specifically mention war treason, the context, of the article suggests that Lieber intended *eo* to characterize such conduct.

<sup>77</sup> Lieber refers to "a place or district under martial law" in Article 90; "a country or place invaded or conquered" in Article 92, an "invaded or occupied territory" in Article 98; and "a hostile and invaded district" in Article 95.

<sup>78</sup> See 2 OPPENHEIM, *op. cit.* supra note 52, at 425, 575; BRITISH MANUAL para. 640.

<sup>79</sup> *Ibid.*

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Civilian Convention. Undoubtedly the reason is that the word “treason” implies a breach of allegiance and it is emphasized in the Civilian Convention that the inhabitant of occupied territory is not bound to the occupying power by any duty of allegiance.<sup>80</sup>

The nearest modern counterpart to Lieber’s war treason in international law is contained in Articles 64–68 of the 1949 Geneva Civilian Convention. Under this convention the occupying power may enact criminal laws, which must be duly published and which must not be retroactive, to insure the orderly government of the country and the security and needs of the army of occupation. These laws may be administered by nonpolitical military courts sitting in the occupied territory, although courts of appeal may sit elsewhere.<sup>81</sup> The death penalty may be imposed on a civilian inhabitant only where he is guilty of espionage (or serious acts of sabotage against military installations of the occupant or of intentionally causing death). However, such offenses must have been punishable by death under the law of the occupied territory prior to occupation,<sup>82</sup> and the attention of the court must be drawn to the fact that the accused does not owe any duty of allegiance to the occupant. In no case can a protected person be given the death penalty if he was under eighteen years of age at the time of the offense.<sup>83</sup> For most offenses other than those discussed herein, the punishment may be only internment or simple imprisonment.<sup>84</sup> It would seem that Lieber’s offense of war treason, since it falls *outside* the commonly accepted definition of espionage with its requirement of clandestine activity, would be treated as one of these non-capital crimes. The only possible exception may be if the action constitutes a “grave collective danger” under Article 68(1).

The offense of war treason, although not so termed, survives in the municipal law of the United States. Paragraph 185 of the *Manual for Courts-Martial, United States, 1951*, provides, *inter alia*, as follows:

A person living in occupied territory who, without dissimulation, merely reports what he sees or what he hears through agents to the enemy may be charged under Article 104 of the . . . [*Uniform Code of Military Justice*] with giving intelligence to or communicating with the enemy, but he may not be charged under this article with being a spy.

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<sup>80</sup> GCC, art. 68.

<sup>81</sup> GCC, arts. 64–66.

<sup>82</sup> The United States, the United Kingdom, Canada and the Netherlands reserved the right to impose the death penalty for these offenses regardless of whether this was possible under the preoccupation law.

<sup>83</sup> GCC, art. 68.

<sup>84</sup> GCC, art. 68.

In FM 27-10 the only reference to “war treason” is in the index where it says “See Espionage, sabotage, and treason.”<sup>85</sup> Ultimately, the reader is referred to paragraph 79 on page 33, which merely quotes Article 104 of the *Uniform Code of Military Justice*<sup>86</sup> which deals with aiding the enemy and gives a brief interpretation. It is indicated that cases occurring in the United States outside military jurisdiction are triable by the civil courts under the espionage laws<sup>87</sup> and the laws relating to treason.<sup>88</sup>

Many articles of the Lieber Code deal with the problem of hostile activities on the part of enemy citizens not in uniform. In addition to the war traitor who did not take up arms but dealt only in information, others took an active role and became what might be termed “irregular combatants” to distinguish them from the regular forces.

#### 4. Irregular Warfare.

Section IV of the Lieber Code which might have been entitled “The Irregular Combatant,” dealt with the subjects of partisans, armed enemies not belonging to the Hostile Army, scouts, armed prowlers, and war rebels. Historically, this section of the code, for the most part, can be traced to a pamphlet entitled *Guerrilla Parties considered with reference to the Laws and Usages of War* written by Lieber in August of 1862 at the request of Major General Henry W. Halleck, then General-in-Chief of the United States Army. The reason for such a pamphlet is best explained by the letter from Halleck to Lieber requesting it. Halleck stated that:

The rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses, and to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents, and that when captured, they have extended to them the same rights as other prisoners of war; they also threaten that if such persons be punished as marauders and spies, they will retaliate by executing our prisoners of war in their possession.<sup>89</sup>

<sup>85</sup> FM 27-10, p. 234.

<sup>86</sup> “Any person who—

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct.”

<sup>87</sup> 18 U.S.C. §§ 791-99 (1958).

<sup>88</sup> 18 U.S.C. §§ 2381-91 (1958).

<sup>89</sup> Halleck to Lieber, August 6, 1862.

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In practical effect, the Lieber Code divided “irregular combatants” into two categories. The first of these, his so-called “partisan,” was entitled to the status of a prisoner of war. The second category, embraced everyone who, although not (1) a regular soldier, (2) a partisan, or (3) a member of a *levee en masse*, nevertheless committed hostile acts against the invading or occupying army.

The first article of Section IV<sup>90</sup> defines the term “partisan.” In *Guerrilla Parties* Lieber had stated that this is a term which is “vaguely used” and so in the *Instructions* he attempts to attach a limiting definition to the effect that partisans are soldiers, armed and wearing the uniform of their army, but that they belong to a corps which is detached from the main army, “for the purpose of making inroads into the territory occupied by the enemy.”<sup>91</sup> These partisans, if captured, are entitled to the privileges of a prisoner of war. In *Guerrilla Parties*, Lieber spoke more broadly, saying that partisans are entitled to the privileges of the law of war, so long as they do not transgress it themselves.

The reason for Lieber’s careful definition, including the requirements of being “soldiers, armed and wearing the uniform of their army,” becomes apparent when some of the succeeding articles are considered. For example, Article 82 provides:

Men, or squads of men, who commit hostilities, whethei by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates<sup>92</sup>

Then Lieber adds Article 84, which defines armed prowlers in terms of their activities. He says that whatever you call them, persons of the enemy’s territory who steal within the lines of the hostile army to (1) rob, (2) kill, (3) destroy bridges, roads, or canals, (4) rob or destroy the mail, or (5) cut telegraph wires, are not entitled to be treated as prisoners of war. Aside from the robbery and the killing of persons unconnected with the war effort, it would seem that all of these activities are legitimate ones for the partisan, as he defines them. In fact, in *Guerrilla Parties*, Lieber points out that the partisan acts chiefly upon the enemy’s lines of connection and communication. Undoubtedly,

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<sup>90</sup> Lieber, art. 81.

<sup>91</sup> *Ibid.*

<sup>92</sup> Lieber, art. 82.

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Lieber meant to exclude partisans from Article 82 by means of his carefully worded definition of partisans and by merely referring to “persons of the enemy’s territory” in Article 84.

Within Section IV Lieber defines another category of persons who are deemed to be beyond the pale and not entitled to be considered prisoners of war. This is his so-called “war rebel”:<sup>93</sup>

War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence.<sup>94</sup>

This is based on the concept that the inhabitant of occupied territory owes a certain allegiance to the occupier and has a duty to terminate his resistance when occupancy has become an actual fact.

However, as in the case of the war traitor, it is clear that today the civilian inhabitant of occupied territory owes no such allegiance to the occupying power.<sup>95</sup>

The rules regarding irregular combatants (but not the terminology) set out by Lieber are in fair accord with the discussion contained in FM 27-10?<sup>96</sup>

Through the years, the so-called “guerrillas, partisans, and *francs-tireurs*,” and others who engage in combat against an enemy, in front of or behind his lines, without meeting the qualifications of “lawful” combatant have not been accorded the status of prisoner of war.<sup>97</sup> A problem area in international law has been the treatment of these people, whether as war criminals, or merely as persons whose acts have

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<sup>93</sup> Although this relates somewhat to belligerent occupation it is discussed because of its importance to the question of the irregular combatant.

<sup>94</sup> Lieber, art. 85.

<sup>95</sup> GCC, art. 68. In 1948 prior to the drafting of the 1949 conventions a Dutch court had occasion to deal with the problem of the hostile uprising of inhabitants of occupied territory. The court stated that civilian inhabitants of occupied territory are not forbidden to form resistance forces because they are not bound either morally or legally by any duty of obedience to the occupying power. Further, the court held that such activities are not war crimes and could not justify reprisals. However, such persons, if captured, could be punished. The court compared the situation to that of spies, in that one belligerent could lawfully employ them and the other could lawfully punish them if they are captured. *In re Rauter*, 14 United Nations War Crimes Commission: Law Reports of Trials of War Criminals 89-138 (1949).

<sup>96</sup> FM 27-10, paras. 80-82.

<sup>97</sup> 3 HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1797 (2d rev. ed., 1945); FM 27-10, paras. 80, 81.

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been harmful to the opposing belligerent. It was generally understood before 1949 that such persons were subject to the death penalty and that was about the only clear part of the law in this regard.<sup>98</sup>

In 1949 the law was clarified in this area by the Geneva Conventions. Under Article 4 of the 1949 Geneva Prisoner of War Convention,<sup>99</sup> members of militias, volunteer corps or resistance movements who comply with the requirements that (1) they be commanded by a responsible person, (2) wear a fixed distinctive sign, (3) carry arms openly, and (4) comply with the laws of war, are, even in occupied areas, entitled to be treated as prisoners of war if they are captured. Thus, Lieber's war rebel or any other irregular combatant could gain prisoner of war status upon capture if they complied with these four requirements. However, the usual secretive nature of such groups makes compliance with these four requirements (particularly the use of distinctive insignia and the open bearing of arm) very unlikely. Also, although not a war crime, their hostile acts will usually be a capital offense against occupation law as set out in Article 68(2) of the Civilian Convention. This being true, these people are left with only the procedural and general safeguards afforded by the Civilian Convention.<sup>100</sup>

While discussing the subject of irregular combatants, it is logical to raise the question regarding the status of the uniformed United States Army Special Forces soldier who aids and advises guerrilla groups. As a uniformed soldier he is entitled to prisoner of war status and is not amenable to trial for his acts unless he has committed a war crime. He is not guilty as an aider or abettor to a war crime because the hostile acts of the guerrillas are not war crimes, but only violations of occupation law.

As has been pointed out, guerrilla activities have become increasingly important both in international conflicts and conflicts of less than international character. Both in the Lieber Code and in today's practice, the rules are principally directed toward protecting the *uniformed* combatant in the event of capture. Lieber's rules were drafted during and were first used in a civil war. In this application, his rules are somewhat reflected in the common Article 3 of the 1949 Geneva Conventions governing conflicts of less than international character. This provision, of course, is not applicable to conflicts between States. In these conflicts,

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<sup>98</sup> Baxter, *So-Called "Unprivileged Belligerency": Spzcs, Guerrillas, and Saboteurs*, 28 BRIT. YB. INT'L L. 323, 326-27 (1951).

<sup>99</sup> Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. & O.I.A. 3316, J.I.A.S. No. 3364 (effective Feb. 2, 1956) [hereinafter cited as GPW].

<sup>100</sup> GCC, art. 5, and Part III, Sec. III.

Articles 64 through 71 of the 1949 Geneva Civilian Convention have contributed significantly to the control of anti-guerrilla operations. Guerrillas may still be punished as in Lieber's day, but only with the judicial safeguards recognized by civilized nations which, through this Convention, have been internationally codified.

Throughout the discussion of irregular combatants the rule emerges that both under the Lieber Code and under today's rules the uniformed combatant,<sup>101</sup> as opposed to the combatant not in uniform, is permitted to commit hostile acts behind enemy lines or in occupied territory, and is entitled to prisoner of war status.<sup>102</sup> As a prisoner of war, he is immune from punishment for his hostile acts unless they are war crimes.<sup>103</sup>

This rule also seems to apply to another practice generally carried out behind the enemy lines or in occupied territory — assassination.

### 5. Assassination and Outlawry.

Assassination<sup>104</sup> is the subject of the single article which makes up Section IX of the Lieber Code. This article provides as follows:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.<sup>105</sup>

During and prior to Lieber's time, writers emphasized that assassination must not be confused with surprises, which were considered lawful. Surprises were defined as the act of an individual *soldier* or of a small detachment of *soldiers* who penetrate the enemy lines in order to kill the enemy general or other leaders. It is said that this is permissible because such acts lack the "disguise or treachery" which gives the deed the character of murder or assassination.<sup>106</sup> The prohibition, then, was against the assassination of an individual by those in *disguise* or *not in uniform*, and against seeking such action by proclaiming an individual an outlaw, subject to being killed without trial.

<sup>101</sup> Construing the term to include those who comply with the four requirements of GCC, art. 4A(2).

<sup>102</sup> The chief exception being the members of a *levee en masse*.

<sup>103</sup> Compare Lieber, art. 56, with *id.* art. 59(1).

<sup>104</sup> See 2 OPPENHEIM, *op. cit. supra* note 52, at 341, 430, 567.

<sup>105</sup> Lieber, art. 148.

<sup>106</sup> See, e.g., 3 Vattel, *LAW OF NATIONS* § 155 (Chitty ed. 1858); HALLECK, *INTERNATIONAL LAW* § 21 (1861).

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The prohibition was carried over into the Hague Regulations of 1899 and 1907 in the form of a brief statement that it is ‘forbidden to kill or wound treacherously individuals belonging to the hostile nation or army.’<sup>107</sup> FM 27-10 construes this article as prohibiting assassination, proscription, or outlawry of an enemy, putting a price on an enemy’s head, or offering a reward for an enemy “dead or alive.” However, it is indicated that it does not preclude attacks on individual soldiers or officers of the enemy no matter where they are located.<sup>108</sup>

The British Manual deals with assassination extensively. Paragraph 115, *inter alia*, recites the prohibition of the Hague Regulations, and paragraph 116 reflects the language of the U.S. Army field manual in regard to outlawry and the offer of rewards. However, in paragraph 115, the prohibition against assassination is expanded and spelled out in some detail. It is stated that the killing or wounding of a selected individual behind the line of battle by enemy *agents* or *partisans* is not a lawful act of war. The example is given of the assassination of Heydrich, the German civilian governor of Bohemia-Moravia, by Czech partisans in 1942. It is pointed out that the perpetrators could have been tried as war criminals. Unable to trace the offenders, the Germans killed the inhabitants of Lidice and destroyed the town. The comment is made that whereas the latter act may at that time have been justifiable as an act of reprisal, the killing of the inhabitants was not, and it was rightly labeled as a brutal massacre by the International Military Tribunal.<sup>109</sup> The British Manual also states that under this prohibition it is not forbidden to send a detachment or individual soldiers to kill, by sudden attack, a member or members of the enemy armed forces. The example is given of the raid by British commandos on General Rommel’s headquarters at Beda Littoria in 1943.<sup>110</sup>

In regard to the prohibition against outlawry, putting a price on the head of an enemy, and the offering of “dead or alive” rewards, the British Manual raises a question which is very pertinent during this period of uprisings and irregular warfare, and that is how far do these rules apply to armed conflicts not of an international character occurring in the territory of a state? The answer clearly seems to be that these rules do not apply except as an aid to construing Article 3 of the 1949 Geneva Conventions.<sup>111</sup>

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<sup>107</sup> HR, art. 23(b).

<sup>108</sup> FM 27-10, para. 31.

<sup>109</sup> BRITISH MANUAL para. 115.

<sup>110</sup> *Ibid.*

<sup>111</sup> They do apply to guerrilla activity in international conflicts.

The common Article 3 of the four 1949 Geneva Conventions<sup>112</sup> sets out the acts which are prohibited in conflicts of less than international character. Paragraph (1)(a) of that article forbids “murder of all kinds” in respect to persons who take no active part in the hostilities, those who are *hors de combat*, and those who have laid down their arms. The probable effect of the common Article 3, when applicable, is to prohibit inducements being given for troops, police or civilians, to take the law into their own hands.<sup>113</sup>

In summary, the rules regarding assassination and outlawry have not changed substantially through the years and the rule of the Lieber Code is still current.

Selective killing by the guerrilla remains a war crime, but the uniformed soldier may commit such acts with impunity. However, governments may not declare an individual an outlaw and place a price on his head.

The basis of prohibiting assassination is its treacherous nature, and likewise the use of poison traditionally has been prohibited because of its treacherous nature. An additional basis of the prohibition against poison has been that it would cause unnecessary suffering.

#### 6. *Right to Prisoner of War Status.*

Article 49 of the Code defines a prisoner of war as a “public enemy” who is armed or attached to a hostile army “for active aid” and who is captured in any way. Then the following categories of personnel who may be prisoners of war are set forth:

- (a) soldiers, of whatever species of arms,
- (b) members of a rising *en masse*,
- (c) all those who are attached to the army for its efficiency and promote directly the object of the war (with certain exceptions later discussed),
- (d) disabled men and officers,
- (e) enemies who have thrown away their arms and asked for quarter,
- (f) citizens who accompany an army for any purpose, such as sutlers, editors, reporters, or contractors,

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<sup>112</sup> The two conventions not hitherto mentioned are the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 12 August 1949, 6 U.S.T. & O.I.A. 3114, T.I.A.S. No. 3362 (effective Feb. 2, 1956) [hereinafter cited as GWS]; and the Geneva Convention for the Amelioration of the Condition of the Rounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. & O.I.A. 3217, T.I.A.S. No. 3363 (effective Feb. 2, 1956) [hereinafter cited as GWS Sea].

<sup>113</sup> BRITISH MANUAL para. 116.

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(g) the monarch, his family, principal officers, and diplomatic agents of the hostile nation,<sup>114</sup> and

(h) partisans.<sup>115</sup>

Under present practice Lieber's term, "soldiers, of whatever species of arms," has been expanded to mean members of the *armed* forces, and the fact that it includes militias and volunteer corps when part of the armed forces has been spelled out.<sup>116</sup> The rising *en masse* is now covered by paragraph A(6) of Article 4 of the Geneva Prisoner of War Convention, Persons accompanying the armed forces are also covered.<sup>117</sup> "Disabled men and officers" is a category equivalent to Article 14 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.<sup>118</sup> Lieber's classification of "enemies who have thrown away their arms and asked for quarter" is merely cumulative to his first category of "soldiers." In today's practice civilian ships' crews and aircraft crews are entitled to prisoner of war status unless they can get more favorable treatment under other provisions of international law.<sup>119</sup>

The second paragraph of Lieber's Article 50, relating to the monarch, his family, principal officers and diplomatic agents, and others,<sup>120</sup> has no exact parallel in either the Hague Regulations or the Geneva Prisoner of War Convention. Senior enemy officials do not become prisoners of war upon capture by the armed forces. However, if military security makes it absolutely necessary, such persons may be put in assigned residences or interned as protected persons under the Geneva Civilian Convention.<sup>121</sup> If senior enemy officials accompany the armed forces and fit into the category outlined in Article 4A(4) of the Geneva Prisoner of War Convention, they are entitled to prisoner of war status upon capture. Heads of state often are the Commander in Chief of the armed forces and thus entitled to prisoner of war status under Article

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<sup>114</sup> Lieber, arts. 49-51 and 52(1).

<sup>115</sup> As defined by Lieber in art. 81.

<sup>116</sup> GPW, art. 4A(1). Possibly Lieber meant to include these latter categories when he said "of whatever species of arms."

<sup>117</sup> GPW, art. 4A(4).

<sup>118</sup> "Subject to the provisions of Article 12, the wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them."

<sup>119</sup> GPW, art. 4A(5).

<sup>120</sup> "The monarch and members of the reigning hostile family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured, on belligerent ground, and if unprovided with a safe conduct granted by the captor's government, prisoners of war." Lieber, art. 50(2).

<sup>121</sup> GCC, arts. 41, 42, and 78.

4A(1) of the Geneva Prisoner of War Convention.<sup>122</sup> Of course, the enumeration of categories in Article 4 is not exhaustive and a belligerent could extend POW status to persons other than those listed.<sup>123</sup> Historically, one of the most difficult questions to be solved has been that of the treatment applicable to “partisans” or “guerrillas.”<sup>124</sup> It has been said that the Brussels Conference of 1874 failed in its attempt to codify the laws of war because of the impossibility of agreement on the question of partisans.<sup>125</sup> As pointed out elsewhere in this article,<sup>126</sup> Lieber set up strict standards in this regard. His definition of “partisans” limited it to “soldiers, armed and wearing the uniform of their army” and said that they were merely detached from the main body to make “inroads into the territory occupied by the enemy.” These people, he said, were entitled to prisoner of war status.<sup>127</sup> Non-uniformed guerrillas, not being part of the organized army, were flatly denied prisoner of war status.<sup>128</sup> Also, under the prevalent concept that the inhabitants of occupied territory owed a duty of obedience to the belligerent occupant, members of resistance movements in occupied areas were not entitled to prisoner of war status.<sup>129</sup> The concept of the rising en masse has not been extended since Lieber’s day to include these people, even though they are the only people who really “rise.” The old *levee en masse* rarely, if ever, occurs.

This question of the irregular combatant is treated in Article 4A(2) of the 1949 Geneva Convention.<sup>130</sup> The four conditions listed therein

<sup>122</sup> BRITISH MANUAL para. 127.

<sup>123</sup> PICTET, COMMENTARY ON THE GENEVA CONVENTIONS RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 51 (1960); FM 27-10, para. 70.

<sup>124</sup> Or any one of the many terms which have been applied to irregular combatants, or those outside the regular armed forces.

<sup>125</sup> Coursier, *Francis Lieber and the Laws of War*, 6 REVUE INTERNATIONALE DE LA CROIX-ROUGE 164 (Supp. 1953).

<sup>126</sup> See p. 18 *supra*.

<sup>127</sup> Lieber, art. 81.

<sup>128</sup> Lieber, arts. 82 and 84.

<sup>129</sup> Lieber, art. 85. See also discussion on War Rebels at pp. *supra*.

<sup>130</sup> The following may be prisoners of war:

“(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.” GPW, art. 4A(2).

are the same ones listed in Article 1 of the 1907 Hague Regulations as being necessary to confer belligerent status and thereby acquire the right to be treated as prisoners of war. All that really has been added is that "organized resistance movements" are included and they may operate "in or outside their own territory, even if this territory is occupied." This latter phrase is very important in that it gives an explicit guarantee to uniformed resistance movements, such as those which sprang up during World War II in France, the Union of Soviet Socialist Republics, and Yugoslavia. It is a break from the traditional rules in that under the Hague Rules it was generally considered that once enemy territory was occupied, the inhabitants had to respect the occupant's attempt to restore and insure public order and safety,<sup>131</sup> and that the sanctions which could be utilized to put down resistance movements included the death penalty.<sup>132</sup> This is no longer true since under the present provision the occupant must treat uniformed captured members of resistance movements as prisoners of war.<sup>133</sup>

However, the very nature of resistance movements or guerrilla units is often that they must operate with a great deal of secrecy and surprise is their stock in trade, because they lack strength to challenge the enemy's armed forces openly. Therefore, it is unlikely that the members of these movements will comply with the four conditions outlined, particularly the use of a distinctive insignia and the open bearing of arms. This being true, these people are left with only the procedural and general safeguards afforded by the Geneva Civilian Convention of 1949.<sup>134</sup> The penalty may still in many cases be death.

It would appear that insofar as the categories of persons entitled to prisoner of war status the scope of persons protected has not progressed very far beyond Lieber. Particularly in the case of non-uniformed combatants the law is still reluctant to spread its protective mantle.

### C. CONVENTIONAL WARFARE

#### 1. Use of Poison.

A customary rule of international law was codified by Lieber's Article 70 prohibiting the use of poison in any manner "be it to poison wells, or food, or arms." This rule, of course, was in accord with the principle

<sup>131</sup> Pursuant to Article 43 of the Hague Regulations

<sup>132</sup> "If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection." Lieber, art. 52(2).

<sup>133</sup> PICTET, *op. cit. supra* note 123, at 58-59.

<sup>134</sup> GCC, art. 5, and Part III, Sec. III.

that the right of belligerents to adopt means of injuring the enemy is riot unlimited.<sup>135</sup> The prohibition against the use of poison or poisoned weapons was carried forward into Article 23(a) of the Hague Regulations of 1907.

The question has been raised as to whether or not it is lawful to poison the drinking water, provided a notice is posted up informing the enemy that the water had been poisoned. During World War I the German commander in South-West Africa attempted to justify just such a practice, but it has been condemned.<sup>136</sup> This is in accord with the traditional British view. However, in the 1940 edition of U.S. Army FM 27-10, paragraph 28, it was stated that although it was unlawful to poison wells, etc., it was lawful to contaminate sources of water by placing dead animals therein or otherwise, provided that such contamination is evident or the enemy was informed of it. Because of the doubtful value of this measure in modern war and the fact that the elements or third parties might destroy the evidence of contamination or any signs that might have been posted, the 1956 FM 27-10 was changed so as to be consistent with the British view.<sup>137</sup>

FM 27-10 (1956) quotes the prohibition of Article 23(a) of the Hague Regulations and in discussion states that this rule does not prohibit measures being taken to dry up springs, to divert rivers and aqueducts from their courses, or to destroy, through chemical or bacterial agents harmless to man, crops intended solely for consumption by the armed forces (if that fact can be determined).<sup>138</sup>

The chief difficulty in applying this rule is encountered when considering poisonous rather than poisoned weapons. The addition of poison to an otherwise legitimate weapon (such as the spear, arrow, or bullet) would make it unlawful only because it would cause unnecessary suffering. It is a different matter when modern weapons such as toxic chemical agents or nuclear weapons are considered. Here the poison, if it can be so called, is an after effect of the weapon's use or an essential part of the weapon itself.<sup>139</sup>

The British Manual ties the prohibition against poison or poisoned weapons in with the prohibition against asphyxiating, poisonous or other

<sup>135</sup> See HR, art. 22.

<sup>136</sup> 2 OPPENHEIM, INTERNATIONAL LAW 340 (7th ed., Lauterpacht ed. 1952), citing 1 GARNER, INTERNATIONAL LAW AND THE WORLD WAR § 190 (1920); BRITISH MANUAL para. 112.

<sup>137</sup> Unpublished annotation to paragraph 37b of FM 27-10 (1956).

<sup>138</sup> FM 27-10, para. 37. The use of chemical agents to destroy the foliage along trails to prevent ambushes in South Vietnam has brought accusations from Communist sources that illegal means of warfare are being used.

<sup>139</sup> Compare Minor Symposium, Biological Warfare. 24 MIL. L. REV. 1 (1964).

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gases, and all analogous liquids, materials or devices, including bacteriological methods of warfare.<sup>140</sup>

At this time the United States is not a party to any treaty, now in force, that restricts or prohibits the use of toxic or non-toxic gases, or of bacteriological weapons in warfare. The Geneva Protocol of 1925 "for the prohibition of the use in war of asphyxiating, poisonous, or other gases, and of bacteriological methods of warfare,"<sup>141</sup> is now effective between a great number of nations. However, the United States Senate has not given its advice and consent to the ratification by the United States. Therefore, it is not binding upon this country.<sup>142</sup>

FM 27-10 (1940) interpreted the prohibition of Hague Regulation 23(a) as not being applicable to the use of toxic gases.<sup>143</sup> FM 27-10 (1956) is silent on this point, and merely states that the United States is not a party to any treaty which would prohibit its use of chemicals or germs in war.<sup>144</sup> The question as to whether the United States is bound by a customary rule of international law restricting the use of toxic chemical agents remains open.

In regard to nuclear weapons, the noted authority Schwarzenberger reasons that they are illegal because the resulting radiation is an analogous species of the genus "poison" and therefore falls within the prohibition of Hague Regulation 23(a).<sup>145</sup> Article 35, FM 27-10, adopts the position that "explosive atomic weapons" are not violative of international law in the absence of a rule restricting their use. This conclusion is explained by the unpublished annotation to FM 27-10 (1956) by stating that the word "explosive" was inserted to avoid taking a position on the use of a nuclear weapon the effect of which is limited to radiation. Such a weapon might be prohibited by *HR*, Article 23(a).

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<sup>140</sup> *BRITISH MANUAL* para. 111. In a footnote to that paragraph, Hague Regulation 23(a) and the Gas Protocol are cited, and the following comment is added:

"The diffusion of poisonous and asphyxiating gases from cylinders or otherwise than by projectiles—a practice instituted by the German forces during the First world war—whether or not within the prohibition of the use of 'poison or poisoned weapons' contained in Hague Rules 23(a) was illegal in so far as it exposed combatants to unnecessary suffering, conduct prohibited by that rule."

This comment, of course, leaves the question open if these gases did not cause unnecessary suffering—as prohibited by *HR*, art. 23(c).

<sup>141</sup> 94 L.N.T.S. 65.

<sup>142</sup> FM 27-10, para. 38.

<sup>143</sup> FM 27-10 (1940), para. 25.

<sup>144</sup> FM 27-10, para. 38.

<sup>145</sup> For a comprehensive treatment of the subject, see SCHWARZENBERGER, *THE LEGALITY OF NUCLEAR WEAPONS* (1958).

It might be observed that the Hague Regulations merely internationalized Lieber's rule on the use of poison or poisoned weapons and is still in effect, so far as it goes. The major step beyond Lieber in this area has been the Geneva Gas Protocol of **1925** which adds the prohibition against gases and bacteriological warfare.

Lieber did not deal with limitations on the types of weapons (other than poison) nor their use, except in the most general way. However, this is understandable. At the time when he was writing the sighted weapon was almost universal. Except for small refinements, weaponry had not changed substantially since the days of the American Revolution. No new weapons proposed to change the techniques of warfare or to shift the weight of advantage toward either side. The iron-clad warship was probably the greatest innovation in warfare of the time. Except for the development of exploding projectiles, this situation with respect to weaponry did not change substantially until the advent of the airplane.

Following the Lieber Code the first attempt on an international level to limit the use of weapons was the Declaration of St. Petersburg in **1868**. This Declaration condemned weapons which "uselessly" aggravate suffering and forbade the "employment . . . of any projectile of a weight below **400** grammes (about **14** oz) which is either explosive or charged with fulminating or inflammable substances." In the years to follow, technical developments moved far beyond the scope of this prohibition. It is somewhat ironic to note that larger projectiles of greater power were not prohibited in any way by this Declaration. It seems that the theory of the drafters was that larger shells would not be directed primarily at personnel. Later, in the Hague Declaration of July **29, 1899**, "Dum-Dum" bullets and gas projectiles were prohibited. However, the Hague Regulations of **1907** merely provided that belligerents do not have an "unlimited right as to the choice of means of injuring the enemy."<sup>146</sup> The only codified expressions of this general rule forbade the use of poison or poisoned weapons,<sup>147</sup> "arms, projectiles, or material calculated to cause unnecessary suffering,"<sup>148</sup> and the short lived Hague Declaration of **1899** forbade the discharge of projectiles and explosives from balloons. This non-acceptance of the latter limitation was due to the fact that far-seeing nations could see the military potential of air power and did not want to tie their hands in the event of future war.<sup>149</sup> The rules that developed prior to **1925** touched only

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<sup>146</sup> HR, art. 22.

<sup>147</sup> HR, art. 23(a).

<sup>148</sup> HR, art. 23(e).

<sup>149</sup> See STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 553 (1959).

the marginal weapons, and not those that were more likely to be decisive.<sup>150</sup> The Hague Rules of Air Warfare, 1923, were not adopted. However, an important advance was the Geneva Gas Protocol of 1925, which also prohibited bacteriological warfare for the first time. The United States never became a party to this agreement, but many other major military powers have done so.

Insofar as the rules of *land* warfare (to which this article is limited) are concerned, these few pieces of international legislation are all that has been accomplished in the field of weapons limitation since the advent of the Lieber Code, despite the technological revolution in weaponry and as the phrase is popularly used today, "weapons systems." Also, the thrust of all of these bits of legislation is to define the prohibited means, rather than to define the permitted means. The effect of this is to cause the legislation to be restricted in application to its terms and to permit new weapons to be developed in a legal vacuum. The status of the law prior to 1925 was such as to impel Spaight to say, "The rule that unnecessary suffering must not be caused by one's choice of the instrument of destruction means today, in practice, that explosive and expanding small arms ammunition is banned," and that "all attempts to extend this pitiful range have failed."<sup>151</sup> This statement was made before the Geneva Gas Protocol of 1925, but the sentiment is still applicable.

## 2. *Withholding of Sustenance.*

Within Lieber's framework of military necessity, all withholding of sustenance or means of life from the enemy is permitted.<sup>152</sup> This idea is reflected in Article 17 which, after stating that war is not carried on by arms alone, provides that it is lawful to starve the enemy, armed or unarmed, in order to defeat him more quickly. Certainly this is a justification of contraband and blockades, such as the long-distance blockade and the extended contraband lists imposed upon Germany in World War I by Great Britain.<sup>153</sup> The concept is apparently still accepted, and its continued utility is obvious.

A customary rule regarding sieges was codified in Article 18 by Professor Lieber. In that article he provides that when the commander of a besieged area expels the noncombatants in the area "in order to lessen

<sup>150</sup> *Id.* at 550

<sup>151</sup> SPAIGHT, *AIR POWER AND WAR RIGHTS* 197 (3d ed 1947) For some unknown reason, this statement has not been qualified in editions published since the 1925 Gas Protocol

<sup>152</sup> Lieber, *ait.* 15

<sup>153</sup> See *Chicago Packing House Cases*, 1 *British and Colonial Prize Cases* 405 (British Prize Court, September 1915).

the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.”<sup>154</sup> The application of this rule during World War II is illustrated by the case of *United States v. Von Leeb (The High Command Case)*.<sup>155</sup> Von Leeb approved an order to drive back civilians by artillery fire if they attempted to leave the besieged town of Leningrad. The tribunal, on the basis of the customary rule, acquitted Von Leeb of a charge based on this action. This rule has been somewhat softened by Article 17 of the 1949 Geneva Civilian Convention for the Protection of Civilian Persons in Time of War:

Article 17. The Parties to the conflict shall endeavor to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

However, it is clear from the wording that this is not a compulsory rule, but merely a strong recommendation to the besieging commander. The customary rule still remains in effect.

Most of the discussion of the rules up to this point has dealt with people and their activities. Of necessity Lieber had to include rules dealing with property.

### 3. Treatment of Property.

There has been a great deal of confusion and continuing controversy regarding the treatment of property under the laws of land warfare. The British Manual breaks its Chapter XIII, dealing with the treatment of enemy property, into four sections: (1) Private Property, (2) Public Property, (3) Property on the Battlefield, and (4) General Devastation. A study of the numerous paragraphs under these sections reveals that in many cases it is not clear whether the rule set out deals with property in an occupied area, on the battlefield, or to both places. FM 27-10 treats the problem in two parts: (1) Treatment of property during combat,<sup>156</sup> and (2) Treatment of property under belligerent occupation.<sup>157</sup> This treatment is not entirely satisfactory either, chiefly due to the vagueness of the terms used and the problem of defining the term “battlefield” as used in paragraph 59 of FM 27-10 which deals with Booty of War.

<sup>154</sup> Lieber, art. 18: BRITISH MANUAL para. 296, is almost a direct quote of Lieber in this regard.

<sup>155</sup> 11 Trials of War Criminals Before the Suremberg Military Tribunals 462 at 563 (1948).

<sup>156</sup> FM 27-10, paras. 56-59.

<sup>157</sup> FM 27-10, paras. 393-417.

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The key article of the Lieber Code dealing with the treatment of property during combat is Article 45 which provides as follows:

All captures, and booty belong, according to the modern law of war, primarily to the government of the captor.

Prize money, whether on sea or land, can now only be claimed under local law.<sup>158</sup>

Article 45, in its first paragraph,<sup>159</sup> refers to a former customary rule under which all enemy property, public or private, which a belligerent could get hold of on the battlefield was booty, and could be appropriated. However, the rule is now obsolete as regards *private* property belonging to prisoners of war, except military papers, arms, horses, and the like.<sup>160</sup> It is also obsolete as to property of private citizens except that which has been used by the troops to further the fighting. This latter category of property might be confiscated on the theory that it has forfeited its right to be treated as such when it is used by the armed forces for active military purposes. Of course, the customary rule as expressed by Lieber is still valid as regards public enemy property found on the battlefield. Paragraph 59b of FM 27-10 states that, other than the listed exceptions for prisoners of war, private movable property captured or found on the battlefield may be appropriated only to the extent that such taking is permissible in occupied areas. Pursuing the matter in this manner seems to support the view expressed regarding private property which has been used for military purposes.

The only provisions of the Hague Regulations of 1907 dealing with property which do not appear to apply to occupied areas are Articles 23(g)<sup>161</sup> and 28,<sup>162</sup> and those articles relating to bombardments. Under this view, these articles would be applicable to areas invaded but not yet occupied. These isolated provisions are hardly sufficient to guide the invading commander. Also, the idea that the limitations of the Hague Regulations contained in Section II on occupation should be applied by analogy in areas not yet occupied is not entirely satisfactory

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<sup>158</sup> Lieber, art. 45.

“The second paragraph insofar as applicable to prizes in land warfare is obsolete.

<sup>160</sup> See HR, arts, 4, 14; GPW, art. 18.

<sup>161</sup> “. . . it is especially forbidden. . . . To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”

<sup>162</sup> “The pillage of a town or place, even when taken by assault, is prohibited.”

because it may impose unduly strict limitations on the military commander in a combat situation.<sup>163</sup>

Lieber, steeped in a tradition of respect for property and particularly private property, linked the treatment of property and of persons. He felt that wanton violence against persons in an invaded country, such as rape, wounding and murder, the needless destruction of property and pillage were all such heinous crimes that they warranted death as a punishment or some other severe punishment.<sup>164</sup> Pillage, of course, is expressly prohibited by Articles 28 and 47 of the Hague Regulations of 1907 and by Article 33 of the Geneva Civilian Convention of 1949.<sup>165</sup> Also, a member of the armed forces of the United States who before or in the presence of the enemy quits his place of duty to plunder or pillage may be tried for the offense of misbehavior before the enemy.<sup>166</sup> The other offenses outlined by Lieber are also punishable under the *Uniform Code of Military Justice* and by similar laws in the armed forces of other nations. His prohibition against needless destruction of property is consistent with modern law, of course. It might be phrased another way to the effect that the destruction of property is limited by military necessity.<sup>167</sup> Article 147 of the 1949 Geneva Civilian Convention probably has supplemented Article 23(g) of the 1907 Hague Regulations. Article 147 of the Civilian Convention characterizes "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" as a "grave breach of the Convention." This article may be construed either to prohibit general devastation or, by implication, to recognize "extensive destruction" as lawful if "justified by military necessity."<sup>168</sup>

An example of destruction permitted by military necessity is found in the *High Command Trial (Wilhelm von Leeb and Others)*. In that case the United States Military Tribunal at Nuremberg held that, under the circumstances of the case, the general devastation ordered by the accused in Russia may have been within the measures permitted by

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<sup>163</sup> Annex 111, Report of the Cambridge Conference on the Revision of the Law of War [hereinafter cited as Cambridge Conference] 12 (1953).

<sup>164</sup> Lieber, art. 44. In the last paragraph of Article 44 Lieber imposes a harsh rule that somewhat shocks the contemporary mind that has been trained in the concept of due process of law. He states that any soldier or officer who is caught in the act of committing such violence and who disobeys a superior who orders him to abstain from it may be lawfully killed on the spot by such superior.

<sup>165</sup> See also FM 27-10, paras. 47, 272, 397; BRITISH MANUAL paras. 42, 306, 626.

<sup>166</sup> UCMJ, art. 99 (6).

<sup>167</sup> See language in Lieber, arts. 15 and 16, to this effect. See HR, art. 23(g); GCC, art. 147.

<sup>168</sup> Annex 111, Cambridge Conference, *supra*, note 163, at 13.

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military necessity as recognized by Article 23(g) of the Hague Regulations. The Court said:

Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations required detailed proof of an operational and tactical nature."<sup>169</sup>

Along with the articles dealing with the use and disposition of property, Lieber includes an article providing that classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, must be secured against all avoidable injury, even when contained in fortified places under siege or bombardment.<sup>170</sup> This is similar to the protection of Article 56 of the 1907 Hague Regulations, and Article 5 of Hague Convention No. IX of 18 October 1907, concerning Bombardment by Naval Forces in Time of War.<sup>171</sup> The Roerich Pact<sup>172</sup> to which the United States and some other of the American republics are parties also gives a neutral and protected status to historic monuments and to institutions of the type described by Lieber.

The Hague Convention of May 1954 on the Protection of Cultural Property in the Event of Armed Conflict, which was intended to have a wider geographical coverage than the Roerich Pact, was entered into force on August 7, 1956. A great number of the Warsaw Pact nations and some of the NATO nations have ratified this Convention.<sup>173</sup> The United States has signed, but not yet ratified, this convention.

The problem of marking protected buildings and property has always been a concern of treaty writers.

#### 4. *Flags of Protection.*

In Articles 115 and 116 Lieber provided for flags of protection (he indicated that they were usually yellow) to designate hospitals and indicated that the honorable belligerent would be guided by these flags insofar as the contingencies and necessities of the fight would permit. In Article 118 it is stated that "sometimes" the practice was to mark and

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<sup>169</sup> 11 Trials of War Criminals before the Xuremberg Military Tribunal 462 (1948).

<sup>170</sup> Lieber, art. 35. This same article contains a mention of like protection for hospitals. See the discussion on flags of protection *infra*.

<sup>171</sup> 36 Stat. 2351; T.S. No. 542; [hereinafter referred to as H. IX].

<sup>172</sup> Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, 15 April 1935, 49 Stat. 3267; T.S. No. 899; mentioned in FM 27-10, para. 57.

<sup>173</sup> Moritz, *The Common Application of the Laws of War Within the NATO-Forces*, 13 MIL. L. REV. 22 (1961).

protect works of art, scientific museums, observatories, and libraries also. The principle of all of these articles was included in Article 27 of the 1899 Hague Convention. In Article 27 of the 1907 Hague Regulations governing land warfare, historic monuments were added. Also the definition of protected buildings was included.<sup>174</sup> In Article 117, Lieber states that the deception of the enemy by flags of protection is an act of bad faith which may be good cause for refusing to respect such flags. This is in accord with current practice.<sup>175</sup>

Of course, today, instead of Lieber's yellow flag, hospitals are marked with the distinctive emblem provided by the Geneva Convention<sup>176</sup> and in the case of these markings, warning must be given before they can be disregarded. Also a reasonable time must be given for the enemy to heed the warning before the protection ceases.<sup>177</sup>

In regard to other protected buildings and monuments it has been suggested that the distinctive markings of the Hague Convention on naval bombardment might be adopted.<sup>178</sup>

### 5. *Warning of Bombardment.*

In 1864, the year following the issuance of General Order 100, General Sherman bombarded Atlanta without warning. Confederate General Hood protested against this action on the grounds that notification was "usual in war among civilized nations." Sherman replied as follows:

I was not bound by the laws of war to give notice of the shelling of Atlanta, a fortified town, with magazines, arsenals, founderies, Esicl, and possible stores; you were bound to take notice. See the books.<sup>179</sup>

Sherman's contention was certainly not borne out by the Lieber Code, Article 19, of which states:

Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is not infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

<sup>174</sup> FM 27-10, paras. 45, 46; BRITISH MANUAL paras. 300-305; 2 OPPENHEIM, *op. cit. supra* note 136, at 420; See also references and discussion in the preceding section on property.

<sup>175</sup> FM 27-10, para. 46c; BRITISH MANUAL para. 303. See examples in 2 OPPENHEIM, *op. cit. supra* note 136, at 420.

<sup>176</sup> GWS.

<sup>177</sup> GWS, art. 21.

<sup>178</sup> H. IX, art. 5(2), which provides: "It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white."

<sup>179</sup> 2 SHERMAN, MEMOIRS 121, 128 (1904).

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There was no question of a surprise attack at Atlanta, which was then full of noncombatants, and Sherman's view, as he states it, cannot be reconciled with Article 19 of the Lieber Code. The same position was adopted by Bismarck in 1870, when he refused to give notice of the bombardment of Paris. The French protest of Bismarck's action was supported by all the foreign diplomatic agents in Paris.<sup>180</sup>

Article 26 of the Hague Regulations of 1907 provided that, except in the case of an assault, an attacking commander should do all in his power to warn the authorities before commencing a bombardment. This rule did not impose a strict duty of notification, however, because a commander only has to do *all he can* to serve notification.

A modern example of such a pre-bombardment warning occurred in 1945 when a warning was given to the German commander of Munster, Germany, that an intensive bombardment would begin unless he surrendered. The German commander refused and the town was bombarded heavily and intensely.<sup>181</sup>

Paragraph 43b of FM 27-10 appears to place a qualification on the notice requirement set out in Article 26 of the Hague Regulations by construing the requirements to refer only to places where parts of the civilian population remain.<sup>182</sup>

The rule requiring notice of bombardment has not fallen into disuse. The practice during World War II and during the Korean War indicates that, at least in the case of aerial warfare, warning is often given before bombardment.<sup>183</sup>

### 6. Hostages

Up to this point a number of rules governing land warfare have been discussed. The question of enforcement is always raised when rules are enunciated which are supposed to govern two sovereign states. In early times the practice of giving and accepting hostages as a means of securing obedience to the rules of land warfare was very common. Hostages were given or exchanged to insure the observance of armistices, treaties and other agreements which depended on good faith, and they were responsible with their lives for any perfidy.

Lieber defined a hostage as "a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the

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<sup>180</sup> SPAIGHT, *WAR RIGHTS OF LAND* 171-172 (1911)

<sup>181</sup> *BRITISH MANUAL* para 291

<sup>182</sup> A like view is found in the *BRITISH MANUAL* para 291

<sup>183</sup> *DEPT OF ARMY PAMPHLET 27-161-2, 2 INTERNATIONAL LAW* 50 (1962), citing Third Report of the United Nations Command Operations in Korea for the Period 1 to 15 August 1950. U.S. Doc 6/1756, 4 Sept 1950, p 7.

war, or in consequence of a war,"<sup>184</sup> but added that they "are rare in the present age," Article 55 provides that a hostage is to be treated as a prisoner of war. Major General George B. Davis, a former Judge Advocate General of the Army, said in 1913 that the practice of giving hostages was not mentioned in the 1899 Hague Convention because it was obsolete in European war.<sup>185</sup> Hostages were not mentioned in the 1907 Hague Regulations either.

The hostages taken by the Germans from the civilian population of occupied areas during both World Wars were of a different type than those mentioned by Lieber. Those taken by the Germans were more in the nature of "reprisal prisoners" seized to enforce obedience to their occupation orders and to deter hostile acts against German troops by the inhabitants of occupied territory.

At least until the time of World War II, the taking of hostages as an extreme measure was recognized.<sup>186</sup> However, during World War II Germany carried out the mass shooting of hostages on such an unprecedented scale that the punishment of this atrocity was declared by the United Nations to constitute a major purpose of the war. The killing of hostages was among the acts declared to be war crimes over which the International Military Tribunal had jurisdiction.<sup>187</sup>

Since the Hague Regulations made no mention of hostages, the state of the law was somewhat confused. Some writers felt that the provisions of Article 46<sup>188</sup> and the prohibition against collective penalties in Article 50<sup>189</sup> were designed to protect hostages.<sup>190</sup> However, based on the listing of the killing of hostages as a war crime in its Charter, the International Military Tribunals tried a number of cases, and these holdings showed some divergence of views. Among the cases decided were the *Case of List and Others* (sometimes called the Hostages

<sup>184</sup> Lieber, art. 54.

<sup>185</sup> Davis, *Memorandum showing the relation between General Order No. 100 and the Hague Convention with respect to the Laws and Customs of War on Land*, 7 AM. J. INT'L L. 466-69 (1913).

<sup>186</sup> 3 HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1902-03 (2d rev. ed., 1945); FM 27-10 (1940), para. 359.

<sup>187</sup> Article 6, Charter of the International Military Tribunal.

<sup>188</sup> "Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited."

<sup>189</sup> "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

<sup>190</sup> See, e.g., 1 GARNER, INTERNATIONAL LAW AND THE WORLD WAR §§ 195-201 (1920).

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Trial);<sup>191</sup> *In re Rauter*;<sup>192</sup> and the *German High Command Trial*.<sup>193</sup> It is not easy to distinguish in these cases between the taking of reprisals in an excessive and illegal manner and the unjustified shooting of hostages.

In 1948 Lord Wright concluded a very thorough examination of the subject of hostages with the following statement:

My own settled opinion, based on principle and on authority, is that the killing of hostages (which includes reprisal prisoners) is contrary to the law of war, and that it is not permissible in any circumstances, and that it is murder.<sup>194</sup>

The following year the matter was settled when the 1949 Geneva Civilian Convention flatly prohibited the taking of hostages from among the civilian population.<sup>195</sup> Also, the common Article 3 of the four 1949 Geneva Conventions, which relates to civil wars or other conflicts not of an international character, states that the taking of hostages is prohibited. Therefore, a second type of "hostage" has now passed into legal history. It remains to be seen if the mind of man can devise a third type.

As traditional methods of securing legitimate warfare, hostages and reprisals are very closely related, and any discussion of one seems to lead to the other.

### 7. Reprisal.

The Lieber Code, in Article 27, recognizes retaliation as a necessary evil, which is well entrenched in the law of war.<sup>196</sup> In his lectures at Columbia College, prior to the writing of the *Instructions*, Professor Lieber had itemized the dangers of retaliation, pointing out that it goes too far in cases of cruelty, the remedy may be disproportionate to the offense, it is sometimes impossible, and it may become mere revenge.<sup>197</sup>

Article 28 of the Lieber Code stresses that retaliation should be used only as a last resort "as a means of protective retribution" and not as a "measure of mere revenge." The article concludes with the statement

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<sup>191</sup> 11 Trials of War Criminals Before the Suremberg Military Tribunal? 1230 (1948).

<sup>192</sup> 14 United Nations War Crimes Commission. Law Reports of Trials of War Criminals 89-138 (1949).

<sup>193</sup> 11 Trials of War Criminals Before the Suremberg Military Tribunals 462 (1948).

<sup>194</sup> Wright, *The Killing of Hostages as a War Crime*, 25 BRIT. YB. INT'L L. 296. 310 (1948).

<sup>195</sup> GCC, art. 34.

<sup>196</sup> By "retaliation" Lieber meant what we refer to today as "reprisal."

<sup>197</sup> Baxter, *The First Modern Codification of the Laws of Land Warfare* 3 (reprinted from the International Review of the Red Cross (Supp. 1953)).

that, "Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages."

Reprisals are one of the traditional methods of securing legitimate warfare.<sup>198</sup> Obviously, this is an area which is susceptible to great abuse. Perhaps the difficulty with treating the problem is reflected by the fact that the Brussels Declaration of 1874 and the Hague Regulations of 1907 do not mention it at all. Lieber really gives little guidance. He merely recognizes it and advises that it be used cautiously and never for "mere revenge." Thus, rules regarding reprisals have been left to the customary law.

Under the contemporary view, a reprisal has a number of characteristics ~ It must be an unlawful act, which is done for the purpose of compelling the other belligerent to observe the laws of war.<sup>200</sup> All other means must have been exhausted before a reprisal is used.<sup>201</sup> A reprisal must be done only under the orders of a commander and after consultation with the highest available military authority which time permits.<sup>202</sup> It must be committed against enemy personnel or property,<sup>203</sup> and must be proportional to the original wrong.<sup>204</sup> However, not all enemy personnel and property are legitimate objects of reprisal.<sup>205</sup>

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<sup>198</sup> 2 OPPENHEIM, INTERNATIONAL LAW 557 (7th ed., Lauterpacht ed. 1952); SPAIGHT, *op. cit. supra* note 180, at 462; STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 353-54 (1959).

<sup>199</sup> See DEP'T OF ARMY PAMPHLET 27-161-2, 2 INTERNATIONAL LAW 65-67 (1962). See also 2 OPPENHEIM, *op. cit. supra* note 198, at 136-44, 561-65.

<sup>200</sup> See FM 27-10, para. 497a. See also BRITISH MANUAL para. 642.

<sup>201</sup> See FM 27-10, para. 497b; BRITISH MANUAL para. 646.

<sup>202</sup> See FM 27-10, para. 497d; BRITISH MANUAL para. 645.

<sup>203</sup> Striking at the ships of a neutral cannot be justified as a reprisal. See FM 27-10, para. 497a.

<sup>204</sup> The war crimes courts in United States v. List (The Hostage Case), 11 Trials of War Criminals Before the Xuremberg Military Tribunals 1230, 1248 (1948), and in the Trial of General von Mackensen and General Maelger, 8 United Nations War Crimes Commission, Law Reports of Trial of War Criminals 1-8 (1949), applied the proportionality rule to the taking of hostages and reprisal prisoners. In STONE, *op. cit. supra* note 198, at 354-55, it is pointed out that while this requirement is laid down in general terms, and in the past proportionality has been shown, and even correspondence, it is difficult to see how this can be insisted upon since international law allows measures which are of an entirely different nature than the act originally complained of. It is stated that this is the reason that innocent people generally suffer from reprisals.

<sup>205</sup> The 1949 Geneva Conventions prohibit reprisal action against the person or property of prisoners of war (GPW, art. 13), sick, wounded and shipwrecked members of the enemy armed forces (GSW, art. 46; GSW Sea, art. 47), and enemy civilians either in occupied territory or in the domestic territory of the enemy belligerent (GCC, arts. 33, 34). See also BRITISH MANUAL para. 644.

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Lieber's recognition of reprisals, his cautionary instructions and his general directions as to their use are as valid today as they were when written one hundred years ago, except that since the Geneva Conventions of 1929 and 1949 their scope has been reduced considerably.

In this era of nuclear weapons, the use of reprisal as a sanction of the law of war is extremely dangerous. There has been a great deal of controversy over the legality or illegality of nuclear weapons. Assuming even that nuclear weapons are illegal, their use might be justified as a gigantic reprisal provided it is not disproportionate.

### 8. *Quarter.*

In Lieber's time one form of reprisal was the refusal of quarter to troops where it was known that they gave none.<sup>206</sup>

The Lieber Code provides that it is "against the usage of modern war to resolve, in hatred and revenge, to give no quarter," and no unit has the right to declare that it will neither give nor expect quarter. However, as an exception, a commander may command his troops to give no quarter "in great straits, when his own salvation makes it impossible to cumber himself with prisoners."<sup>207</sup>

Succeeding articles set out a series of rules which admitted that the practice of giving no quarter still existed in practice. Article 61 provides that troops which give no quarter do not have the right to kill enemies already disabled on the ground, or prisoners captured by others.<sup>208</sup>

As pointed out previously, the Code permits the practice of refusing quarter to troops as a form of reprisal when it is known that they give none.<sup>209</sup> Also, as a reprisal, quarter may be refused to troops who fight in the uniform of their enemy without a "plain, striking, and uniform mark of distinction of their own."<sup>210</sup>

Perhaps the most cold-blooded provision relating to quarter is the provision that when an enemy has been given quarter, but within three

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<sup>206</sup> See Lieber, art. 62.

<sup>207</sup> Lieber, art. 60.

<sup>208</sup> This principle is also reflected in Article 71 which reads as follows: "Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed." Also HR, art. 23(c), reflects this principle in its prohibition of killing or wounding "an enemy who, having laid down his arms, or no longer having means of defense, has surrendered at discretion."

<sup>209</sup> Lieber, art. 62.

<sup>210</sup> Lieber, art. 63; see pp. *supra*.

days after the battle it is discovered that he belongs to a “corps which gives no quarter,” then he may be ordered to suffer death.<sup>211</sup> This, of course, is an obsolete provision since reprisals are not permitted against prisoners of war, and prisoners of war may not be punished without a

At Brussels in 1874 an article was proposed prohibiting refusal of quarter with three exceptions: (1) as a reprisal for previous acts of cruelty, (2) as an unavoidable step to prevent their own destruction, and (3) armies that did not give quarter could not expect it. However, the whole question of reprisals was left undecided and the proviso as to refusal of quarter in cases of extreme necessity was omitted from the final project.<sup>213</sup>

A flat prohibition against declaring that no quarter would be given was contained in the Hague Regulation of 1907.<sup>214</sup>

A recognized contemporary work in the field of international law points out that the rule that quarter must be given has exceptions, giving two examples: (1) where members of a force continue to fire after having hoisted a white flag as a sign of surrender, and (2) by way of reprisal in kind for refusal of quarter by the other side.<sup>215</sup>

The rule expressed in Lieber’s Article 60 that quarter may be denied to prisoners in cases where the safety of the capturing force was vitally endangered is contrary to today’s practice.<sup>216</sup> Lauterpacht comments that such a rule had been stated in the Third Edition of Oppenheim’s *International Law*, but it appears to have changed, particularly in view of the Hague Regulations, Articles 4 through 20 and 23(d), and in view of the fact that these regulations were expressly declared to have been framed in the light of military necessities. He concludes that such prisoners, having been disarmed, should be released.<sup>217</sup>

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<sup>211</sup> Lieber, art. 66.

<sup>212</sup> See GPW, art. 82(1).

<sup>213</sup> SPAIGHT, *op. cit. supra* note 180, at 88–9.

<sup>214</sup> HR, art. 23(d), and HR, art. 23(e), had bearing upon the subject. See note 208 *supra*.

<sup>215</sup> 2 OPPENHEIM, *op. cit. supra* note 198, at 339. However, in regard to the first exception, it is pointed out that Pradier-Fodere opposes the principle in 7 *Traite de droit international public* Nos. 2800–2801 (1885–1906), and attention is drawn to the prohibition of reprisals against PW’s contained in Article 13(3) of the Geneva Prisoner of War Convention of 1949.

<sup>216</sup> FM 27–10, para. 28; BRITISH MANUAL para. 117.

<sup>217</sup> 2 OPPENHEIM, *op. cit. supra* note 198, at 339, citing 3 HYDE, *op. cit. supra* note 186, at 1836.

## D. INSURRECTION—CIVIL WAR—REBELLZOS

The section on insurrection, civil war, and rebellion was not included in the first, draft of the *Instructions*. Lieber, in a letter to General Halleck, indicated that he had not said anything concerning rebellion because he did not feel that it came within the limits as set out in the order appointing the board.<sup>218</sup> However, at Halleck's suggestion, he added a section on insurrection and rebellion, although he "disrelished it."<sup>219</sup> This is true probably because he did not wish the "Code" to be construed as being applicable only to civil war and not to wars between nations.<sup>220</sup>

Traditionally civil wars, those directed against the established government and confined entirely within the borders of the State concerned, have been classified as either belligerencies or insurgencies.<sup>221</sup> However, Lieber begins this section with definitions of "insurrection," "civil war," and "rebellion." These definitions are obviously drawn to fit the purposes of the United States as it found itself in the midst of the Civil War. Insurrection is defined as the "rising of people in arms against their government, its laws, or its officers."<sup>222</sup> Civil war is defined as follows:

Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portion of the state are contiguous to those containing the seat of government.<sup>223</sup>

It is noted that the conflict in which the United States found itself at the time of the issuance of the *Instructions* would not fit within the basic definition. However, his definition of a "rebellion" fits the conflict very well. "Rebellion" is defined as an insurrection of large extent, usually between the legitimate government and "portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own."<sup>224</sup>

After studying these three definitions, it is clear that the Government of the United States wanted in no way to concede that the Confederacy was a sovereign power. On the other hand, the Confederacy wanted Great Britain to recognize them as such.<sup>225</sup> The controversy

<sup>218</sup> Lieber to Halleck, 20 February 1863.

<sup>219</sup> *Ibid.*

<sup>220</sup> Baxter, *The First Modern Codification of the Laws of Land Warfare* 14 (reprinted from the *International Review of the Red Cross* (Supp. 1953)).

<sup>221</sup> Kelly, *Legal Aspects of Counterinsurgency*, 21 MIL. L. REV. 96 (1963).

<sup>222</sup> Lieber, art. 149.

<sup>223</sup> Lieber, art. 150.

<sup>224</sup> Lieber, art. 151.

<sup>225</sup> This point is driven home by successive articles dealing with the legal consequences flowing from the treatment of "rebels" in accordance with the customs and usages of the law of war. See Lieber, art. 152.

between the United States and Great Britain over the belligerency of the Confederacy played a large role in the literature of international law in the years following 1861.<sup>226</sup>

The next three articles of the *Instructions*<sup>227</sup> are devoted to the proposition that when “rebels” are treated in accordance with the law and usages of war because of humanitarian considerations, this has no effect on the legal status of the “rebels.” Lieber spells this proposition out in detail emphasizing (1) it does not imply recognition of their government, if any; (2) neutrals do not have the right to base recognition (as a State, not as belligerent) upon the application of these rules to “rebels”;<sup>228</sup> (3) victory settles future relations between the parties; and (4) it does not prevent the legitimate government from trying the leaders for treason.

The modern counterpart to these three articles of Lieber’s, at least as far as an insurgency and unrecognized belligerencies are concerned, is found in the common Article 3 of the 1949 Geneva Conventions which provides that certain minimum rules will be applied to armed conflicts of less than international character occurring in the territory of one of the signatories. Paragraph 4 of this article provides that “The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”<sup>229</sup> This is an essential clause, without which Article 3 probably would never have been adopted. Pictet might well have been discussing these articles of the *Instructions* when he says, regarding Article 3:

It meets the fear that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the *de jure* Government’s suppression of the revolt by conferring belligerent status, and consequently increased authority and power, upon the adverse party. . . . [The provision] makes it absolutely clear that the object of the clause is a purely humanitarian one, that it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and in all circumstances.

Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has authority of any kind; it does not limit in any way the Government’s right to suppress a rebellion by all the means—including arms—provided by its own laws; nor does it in any way affect that Government’s right to prosecute, try and sentence its adversaries, according to its own laws.<sup>230</sup>

<sup>226</sup> Kelly, *supra* note 221, at 97, citing 1 MOORE, DIGEST OF INTERNATIONAL LAW, para. 66 (1906), and 1 CLAIMS OF UNITED STATES AGAINST GREAT BRITAIN (1869).

<sup>227</sup> Lieber, arts. 152-54.

<sup>228</sup> Again obviously pointed at Great Britain.

<sup>229</sup> See 2 OPPENHEIM, INTERNATIONAL LAW 210-12 (7th ed., Lauterpacht ed. 1952).

<sup>230</sup> PICTET, COMMENTARY ON GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 43 (1960).

It appears that Articles 155 and 156 were included because of, and designed to deal with, the Civil War then in progress. These articles deal with the classification of citizens as to their loyalties, their activities, and the type of treatment that each was to be accorded by the United States military commander. These articles may well have been derived from General Halleck's instructions of 5 March 1863 to the Commanding Officer in Tennessee. In these instructions he directed that loyal citizens were to be protected, citizens who sympathized with but did not actively aid the "rebellion" were to be unmolested so long as they were inactive, and avowed supporters of the rebels could be confined or expelled.<sup>231</sup>

### III. EVALUATION OF PROGRESS OF THE RULES OF WAR SINCE THE LIEBER CODE

#### A. PROGRESS OF THE RULES OF LAND WARFARE

Dr. Lieber did an excellent job of selecting and codifying humanitarian rules in order to lessen the unnecessary suffering inevitably resulting from warfare on land as it was fought at that time. It is clear that his concept of military necessity is restricted or limited by "principles of justice, faith and honor." This is a far cry from the *Kriegsraison* theory expounded by Germany about the turn of the century.

However, the law of land warfare has progressed very little beyond the Lieber Code. The changes wrought by the Hague Conventions of 1899 and 1907, for the most part, merely internationalize many rules set forth by the Lieber Code. At the same time, they retrogressed in that some subjects were omitted and some of Lieber's specific rules were generalized to such an extent that they lose much of their efficacy by vagueness. As far as the omissions are concerned, Kunz puts it this way, "Some of the most important and, at the same time, most controversial problems, such as the problems of hostages and reprisals, were simply passed over under diplomatic silence."<sup>232</sup>

Outside of agreements which attempt to limit weapons, by far the most important step forward in the field of international humanitarian legislation was taken by the Geneva Conventions of 1929 and 1949. These conventions have clarified and extended the protections for those who are helpless in war—prisoners of war, civilians, the sick, and the wounded. A great advance is the common Article 3, contained in all four of the 1949 conventions, which extends certain basic protections to participants in armed conflicts of less than international character. In

<sup>231</sup> Baxter, *supra* note 220, at 33, citing 2 HALLECK, *INTERNATIONAL LAW* (2d Eng. ed., Baker, 1893).

<sup>232</sup> Kunz, *The Chaotic Status of the Laws of War*, 45 *AM. J. INT'L L.* 37, 38 (1951).

many respects the principles of the Lieber Code have been carried over into these conventions, and have been amplified and given much more detail. They have, however, added little to the fund of basic principles from which Lieber drew his code.

### B. BREAKDOWN OF DISTINCTIONS

The Hague Conferences presupposed, *inter alia*, the distinction between private and public property and the sanctity of the former, the distinction between private enterprise and economic activities by the states, and the distinction between the armed forces and the civilian population.<sup>233</sup> The Lieber Code presupposed basically the same things.

The changes in war and changes in modern society have tended to wipe out these distinctions. The first two distinctions concerning property and economic enterprise have been affected because many nations have, since 1907, nationalized industry and have tended toward socialist governments. The third distinction has also felt the passage of time. The mechanization of war and the tremendous economic and industrial support required to maintain mechanized war has caused more and more of the population to be involved in the war effort. The enormous mechanized army of today requires the effort of an entire population to support it. As a result, the entire population, in effect, becomes a strategic target in the enemy's effort toward winning a war. This is very true when, as it is today, the nation which is strongest economically and industrially and the most advanced in technology is more likely to be the victor in a total conflict. The population is more involved emotionally in that contemporary conflicts are most often fought in pursuance of an ideology. As the field of combat comes into the heart of a nation, the population becomes personally involved as guerrilla bands spring up. Thus, the distinctions become virtually non-existent because of the involvement of the civilian population. Conversely, even if the question of actual involvement were not present to wipe out the distinctions, aircraft, nuclear weapons, and long-distance guided missiles make no distinctions as to the status of any person or property incidentally in the target area. Too, the area affected by a nuclear blast or even a mass aerial bombardment is of much greater size. This reduces the necessity for accuracy and increases the likelihood of the destruction of non-military targets.<sup>234</sup>

<sup>233</sup> *Id.* at 40.

<sup>234</sup> In view of the breakdown in these distinctions and the radical change in the character of war, both in scope and in method, the creation of new laws in the previously unregulated areas is chiefly a matter of political decision, not necessarily related to any existing legal principles which are generally accepted. See Lauterpacht, *The Problem of the Revision of the Law of War*, 29 *BRIT. YB. INT'L L.* 360, 379 (1952).

## C. EFFECT OF TOTAL WAR ON THE RULES

The product of the factors discussed is a modern revival of uninhibited violence, *i.e.*, total war. The unsighted weapons have depersonalized the process of inflicting death and devastation. Strangely, as the deathdealing power of weapons has increased, the depersonalization has apparently lowered the moral responsibility because of the time and distance which has been placed between attacker and victim.

The point to be made here is that despite all of these changes in war and in our society, the rules that are still in force are very little removed from those of Lieber. Another observation is that although it has been said that total war has obliterated the rules of warfare, during World War I and during World War II, both of which were acknowledged to be total wars and both of which saw mass violations of the rules, not a single belligerent pretended not to be bound by the laws of war.<sup>235</sup> Both sides attempted to justify actions on the basis of the laws of war. Also, the judgment of the Nuremberg Tribunal confirmed that the laws of war are valid law.<sup>236</sup> These things give hope for future work in this field, because it shows an awareness that "men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."<sup>237</sup>

## D. SANCTIOSS

Although in peacetime, international law may be able to subsist and operate without sanctions other than those of world opinion, protest and compensation, reprisals, and the limited power of the International Court of Justice, few nations will risk a military disadvantage for the sake of preserving a rule unless there is an effective sanction. At the same time, there is a real lack of an effective, acceptable sanction. Reprisals, because of their inherent illegal quality are dangerous in that they may be used merely to excuse infringement of the rules, and reciprocation of them might escalate into world destruction. Also, the 1949 Geneva Conventions have greatly limited those persons who may be the subject of reprisals. Protest and compensation are ineffective and the future of war crimes as a sanction is problematical. The threat of prosecution for the commission of a war crime has never been an effective deterrent. In practice the victors have usually tried the vanquished,<sup>238</sup> and neither side ever intends to lose.

<sup>235</sup> Kunz, *supra* note 232, at 45.

<sup>236</sup> See Judicial Decision, *International Military Tribunals (Nuremberg) Judgment and Sentences, October 1, 1946*, 41 AM. J. INT'L L. 174, 218-19, 225-49 (1947).

<sup>237</sup> Lieber Code, art. 15.

<sup>238</sup> An exception being that Germany is now trying its own.

The mention of reprisals brings forth another matter. There has been a great deal of controversy over the legality or illegality of nuclear weapons. Assuming even that nuclear weapons are illegal, their use might be permitted as a gigantic reprisal provided it is not disproportionate.

E. NEED OF RULES IS UNITED NATIONS PEACE  
KEEPING OPERATIONS

In the contemporary literature of international law, there has been much discussion of the legality or illegality of wars and the consequences flowing therefrom.<sup>239</sup> The study and constant revision of the rules of warfare should not be delayed by these considerations. The mere fact of hostilities, legal or illegal, international or less than international, gives rise to a need for rules to alleviate suffering and to protect human rights.

There has been much discussion as to whether military action under the direction of the United Nations Security Council should be subject to the conventional rules of warfare, since it is supposedly peace-keeping action above the level of nations and the United Nations is not a signatory to any convention. It appears that the answer is clearly in the affirmative. Such actions need regulation, just as municipal police forces are not allowed to act as they like, but are restrained by rules of law.<sup>240</sup>

F. APPLICATIONS OF RULES IS LIMITED WAR

Many of the rules of land warfare are engulfed by the total war concept and planners seem to be facing an insurmountable task in attempting to apply them in that context. However, as it was pointed out in the beginning of this article, total war (at least for the moment) seems to be held in abeyance by the threat of mutual nuclear destruction. As a consequence, the "limited war" comes into prominence. The traditional rules of land warfare, with some revision, can be more effectively used in these "limited" conflicts. Perhaps the anticipated horrors of total war with nuclear weapons will sustain the era of "limited war," because "technological developments make total war only technically possible, but not inevitable."<sup>241</sup>

<sup>239</sup> *E.g.*, Lauterpacht. *The Limits of the Laws of War*, 30 BRIT YB. INT'L L. 206-43 (1953).

<sup>240</sup> Kunz, *supra* note 232, at 54; see Article 44 of the Regulations of the UN Emergency Force, 20 February 1957, issued by the Secretary General of the UN (which directs that this international force observe the "principles and spirit of the general international conventions applicable to the conduct of military personnel").

<sup>241</sup> Kunz *supra* note 232, at 41.

G. VALIDITY OF MORAL AND HUMANITARIAN  
PRINCIPLES

Perhaps the most important conclusion prompted by this study is that the moral and humanitarian principles which guided Lieber in selecting his code provisions from among the many contradictory and unsettled customs and usages of war still must be followed today. These principles balance the notions of military necessity and those of humanity in order to (1) protect both combatants and noncombatants from unnecessary suffering, (2) safeguard fundamental human rights of those who fall into the hands of the enemy, and (3) facilitate the return of peace. International lawyers, particularly those in the military, cannot turn their back on the regulation of warfare in the hope that warfare, being outlawed, will never come. Humanity demands and professional pride compels the legal profession to seek some common ground of understanding and to extend the pitifully small group of international agreements setting forth humanitarian rules for the government of human conflict. This will make the conflict one more worthy of human beings than of animals, and in the words of Lieber, "facilitate the restoration of peace."

War has its laws and justice, as well as peace, and we have learned to make war justly, no less than bravely.—*Camillus*<sup>242</sup>

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<sup>242</sup> *Livy* V., 27

# THE PRESIDENT AND CONGRESS— OPERATIONAL CONTROL OF THE ARMED FORCES\*

BY LIEUTENANT COLONEL BENNET N. HOLLANDER\*\*

## I. INTRODUCTION

### A. EARLY HISTORICAL DEVELOPMENT

Historically, in England, for many years subsequent to the Norman conquest, the authority of the king with respect to the size of the armed forces was almost unlimited. Gradually, however, limitations on this authority developed. Nevertheless, prior to 1688 James II had established a standing army of close to 30,000 men, despite constant disagreement between the crown and parliament regarding the strength of the army. As a result, in 1688 the "King's Prerogative" which, with respect to this power, was considered so dangerous was limited in the newly developed Bill of Rights by incorporating therein a clause declaring it illegal to raise or keep a standing army in time of peace without the consent of parliament.<sup>1</sup> In fact, the very existence of the British Army has actually, thereafter, depended on the passage each year of the "Army (Annual) Act" which must be passed each year to authorize the maintenance of troops for another twelve months.<sup>2</sup>

This historical background accounts for the development amongst the colonists of a deep founded fear of standing armies in time of peace. This ingrained fear was reinforced by the circumstances leading up to the American Revolution.<sup>3</sup> The feelings of the colonists were reflected in the Declaration of Independence wherein, protesting that George III

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<sup>1</sup> THE FEDERALIST No. 26, at 165 (Cooke ed. 1961) (Hamilton).

<sup>2</sup> See RIDGES, CONSTITUTIONAL LAW 246-247 (8th ed. 1950), which also contains a discussion of the historical development of control over the armed forces in Great Britain.

<sup>3</sup> THE FEDERALIST No. 26, at 166 (Cooke ed. 1961) (Hamilton).

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had attempted to render the military independent of and superior to the civil power, it was charged, in addition, that:

He has kept among us. in times of peace, Standing Armies, without the Consent or our legislatures. —He has affected to render the Military independent of and Superior to the civil power. He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws: giving his Assent to their Acts of pretended Legislation ; —For quartering large bodies of armed troops among UP: —For protecting them, by a mock Trial. from punishment for any Murders which they should commit on the inhabitants of these States. . . .

It thus may be seen that the early colonists shared a deep fear of the development under the new government of a military branch unchecked by the legislature and susceptible to use by an arbitrary executive power. On the other hand, there was no desire to limit the development of all necessary military power." The colonists were well aware of its necessity in time of war. To accomplish this, the legislature. which was designed to be responsive to the desires of the people. was empowered to make such laws for the establishment and regulation of the land and naval forces as were to be found necessary to the proper functioning of these forces. There is no indication that any special limitation on the power of Congress, as opposed to the power of the executive was contemplated.<sup>5</sup> The complete concern during this period was concentrated in the desire to limit and control the armed forces within the internal borders of the country. It does not appear that any significant thought was given to limiting control of the armed forces beyond the boundaries of the colonies, other than with respect to the power to declare war. There was no practical necessity to do so.

### B. CONTROL OF THE ARMED FORCES UNDER THE ARTICLES OF CONFEDERATION

The overall structure of the existing system for national defense had been formulated by the Continental Congress and promulgated in the *Articles of Confederation* which was ratified by the Congress on November 15, 1777, and finally approved by the thirteenth state in January, 1781. It was followed throughout the Revolutionary War, serving as the basis for central government.

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<sup>1</sup> See *Reid v. Covert*, 354 U.S. 1, 68 (1957) (Harlan, J., concurring)

<sup>5</sup> *Ibid.*

## CONTROL OF ARMED FORCES

Under the *Articles of Confederation*, the principal, uncontroverted, war power possessed by Congress was that of declaring war.<sup>6</sup> Responsibility for command administration, and supply was confused and divided between Congress and the states. "All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the united states in congress assembled . . . ." were defrayed out of a common treasury, supplied by the several states in proportion to the value of all land within each state.<sup>7</sup> When land forces were raised by a state for the common defense, all officers through the rank of colonel were appointed by the legislature of that state.<sup>8</sup> The Congress appointed all officers of the land forces, in the service of the United States, except regimental officers, appointed all the officers of the naval forces, and issued commissions for all officers including those appointed by the states.<sup>9</sup> The Congress had the "sole and exclusive right and power" to make rules for the government and regulation of the land and naval forces, and to direct their operations.<sup>10</sup> It was further provided that:

The united states in congress assembled shall have authority to appoint a committee, to sit in the recess of congress, to be denominated "A Committee of the States," and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the united states under their direction—to appoint one of their number to preside . . . to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner at the expence of the united states; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the united states in congress assembled. . .<sup>11</sup>

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'ARTICLES OF CONFEDERATION, art. IX (1781), which provides that: "The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . . ." There was, however, an exception to this contained in art. VI which provided that: "No state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the united states in congress assembled can be consulted . . . ."

<sup>7</sup> ARTICLES OF CONFEDERATION, art. VIII (1781).

<sup>8</sup> ARTICLES OF CONFEDERATION, art. VII (1781).

<sup>9</sup> ARTICLES OF CONFEDERATION, art. IX (1781).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

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Once the Continental Army was in the field, principal responsibility for administering and supplying it rested with Congress.<sup>12</sup> The *Articles of Confederation* granted Congress no specific control over the militia, which had to be so frequently called out to supplement the existing armed forces. Nevertheless, Congress had to often arrange for the supply and administration of those militia forces operating with the army.<sup>13</sup>

While a great deal of legislation was required, and in fact was enacted, this legislation often was enacted by the respective state legislatures, frequently on recommendation of the Continental Congress. As an illustration, on November 22, 1777, Congress recommended to specified state legislatures that they appoint commissioners "to regulate and ascertain the price of labour, manufacturers, internal produce . . . and that, on the report of the commissioners, each of the respective legislatures enact suitable laws . . . as to authorize the purchasing commissaries for the army . . . to take . . . [from persons possessing excess supplies or provisions] who shall refuse to sell the surplus at the prices to be ascertained as aforesaid, paying only such price for the same."<sup>14</sup> December 20, 1777 the Continental Congress requested "the respective legislatures of the United States, forthwith to enact laws, appointing suitable persons to seize and take, for the use of the continental army of the said states, all woolen cloths, blankets, linens, shoes, stockings, hats and other necessary articles of cloathing, suitable for the army . . . ." <sup>15</sup>

In some instances, recommendations were made directly to the colonies as on June 10, 1775 when the Continental Congress "earnestly recommended to the several colonies . . . that they immediately furnish the American army before Boston with as much powder out of their town and other public stocks as they can possibly spare . . . ." <sup>16</sup>

Hamilton summarized the situation as follows:

Defective as the present Confederation has proved to be, this principle appears to have been fully recognized by the framers of it; though they have not made proper or adequate provision for its exercise. Congress have an unlimited discretion to make requisitions of men and money—to govern the army and navy—to direct their operations. As their requisitions were made constitutionally binding upon the States, who are in fact under the most solemn obligations to furnish the supplies required of them, the intention evidently was, that the United States should command whatever resources were by them

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<sup>12</sup> U.S. DEP'T OF ARMY, ROTCM 145-20, AMERICAN MILITARY HISTORY [hereinafter cited as ROTCM 145-20] 49 (1956).

<sup>13</sup> *Ibid.*

<sup>14</sup> J. R. CLARK, EMERGENCY LEGISLATION DEALING WITH THE CONTROL AND TAKING OF PRIVATE PROPERTY FOR THE PUBLIC USE, BENEFIT, OR WELFARE 211-212 (1918).

<sup>15</sup> *Id.* at 214-217.

<sup>16</sup> *Id.* at 201.

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judged requisite to “the common defence and general welfare.” It was presumed that a sense of their true interests, and a regard to the dictates of good faith, would be found sufficient pledges for the punctual performance of the duty of the members to the Federal Head.<sup>17</sup>

Whatever executive and legislative power over the armed forces existed was vested in the Continental Congress. This body had direct charge of the war effort and, in the early stages of the conflict following the assembling of the Second Continental Congress at Philadelphia on May 10, 1775, managed or attempted to manage most military matters, including mobilization, tactics, and strategy, by means of subcommittees.<sup>18</sup>

Lacking a central executive, the Congress relied on various boards and committees to perform its executive functions.<sup>19</sup> Congress set up the Board of War and Ordnance composed of selected members of Congress in June of 1776. Later, in 1777, a board composed of selected individuals other than members of Congress was established. Neither of these arrangements was effective, and Congress eventually regulated purely administrative matters by action of the entire membership or by appointing special committees to go to camp.<sup>20</sup> There developed a proliferation of subcommittees, each concerned with some small aspect of the war situation, clearly more related to operations than policy, and none having authority to do more than investigate, suggest methods and courses of action, and report to “the united states in congress assembled”, which would then take final action.<sup>21</sup>

The battles of the Revolution were fought under the direction of a Continental Congress lacking actual power to control. “Inspired by fear of seizure of political control by military leaders, Congress kept a suspiciously watchful eye on the military force and its commanders.”<sup>22</sup> However, despite this desire of the Continental Congress to retain maximum control, the necessities of the situation often required the grant of considerable powers to George Washington. Of particular interest in this regard is the resolution bestowing dictatorial powers

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<sup>17</sup> THE FEDERALIST No. 23, at 148 (Cooke ed. 1961) (Hamilton).

<sup>18</sup> SANDERS, *EVOLUTION OF THE EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774-1789*, at 6 (1935).

<sup>19</sup> *Id.* at 7. Among others, there was a saltpetre committee, a committee on spies, a hospital committee, a medical committee, a committee on the health and discipline of the army, a clothing committee, a beef committee, and a committee on cavalry.

<sup>20</sup> ROTCM 145-20, *op. cit. supra* note 12, at 48.

<sup>21</sup> SANDERS, *op. cit. supra* note 18, at 7-8.

<sup>22</sup> ROTCM 145-20, *op. cit. supra* note 12, at 49.

upon Washington by the Continental Congress dated December 27, 1776:

This Congress, having maturely considered the present crisis; and having perfect reliance on the wisdom, vigour, and uprightness: of General Washington, do hereby,

*Resolve.* That General Washington shall be, and he is hereby, vested with full, ample, and complete powers to raise and collect together, in the most speedy and effectual manner, from any or all of these United States, 16 battalions of infantry, in addition to those already voted by Congress; to appoint officers for the said battalions; to raise, officer, and equip three thousand light horse: three regiments of artillery, and a corps of engineers, and to establish their pay; to apply to any of the states for such aid of the militia as he shall judge necessary; to form such magazines of provisions, and in such places, as he shall think proper: to displace and appoint all officers under the rank of brigadier general, and to fill up all vacancies in every other department in the American armies; to take, wherever he may be, whatever he may want for the use of the army, if the inhabitants will not sell it, allowing a reasonable price for the same; to arrest and confine persons who refuse to take the continental currency, or are otherwise disaffected to the American cause. . . .<sup>23</sup>

## II. THE WAR POWERS

The weaknesses in the central government discovered during the conduct of the Revolutionary War under the *Articles of Confederation* served to induce the makers of the Constitution to vest the new government with adequate powers both to make war and repel attack.<sup>24</sup>

Hamilton's comments in this regard are particularly appropriate:

The principal purposes to be answered by the Union are these—The Common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks—the regulation of commerce with other nations and between the States—the superintendence of our intercourse, political and commercial, with foreign countries.

The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operation—to provide for their support. These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite: and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence.<sup>25</sup>

<sup>23</sup> CLARK, *op. cit. supra* note 14, at 207-208.

"This is reflected at the very beginning of the Constitution, in the preamble, which provides, in part, "We the People of the United States, in Order to form a more perfect Union . . . provide for the common defence . . . ."

<sup>25</sup> THE FEDERALIST No. 23, at 146 (Cooke ed. 1961) (Hamilton).

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The United States Supreme Court has on many occasions described the broad scope of the war powers. In *Home Building & Loan Association v. Blaisdell*,<sup>26</sup> it stated, with respect to the war power, that it "is not created by the emergency of war, but is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation."<sup>27</sup>

Again, in *Hirabayashi v. United States*,<sup>28</sup> the wide scope of the war power, where Congress and the Executive act together, was again described:

The war power of the national government is "The power to wage war successfully". . . . It extends to every matter and activity so related to war as substantially to effect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. . . . Since the constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.<sup>29</sup>

A perusal of the extent of the war powers throughout the history of the United States confirms, with convincing clarity, that the only limitation of the war power is necessity itself. It is as extensive in scope as circumstances require. It is complete, total and adequate when both Congress and the President act in cooperation.<sup>30</sup> The question remains, however, as between the Legislative and Executive branches of the government, which branch possesses each component of the war powers related to the operational control of the armed forces?

### III. THE POWER OF CONGRESS

#### A. GENERAL

The enumeration of Presidential powers, in the Constitution, with respect to the regularly established armed forces is brief.<sup>31</sup> In con-

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<sup>26</sup> 290 U.S. 398 (1934).

<sup>27</sup> *Id.* at 426.

<sup>28</sup> 320 U.S. 81 (1943).

<sup>29</sup> *Id.* at 93.

<sup>30</sup> See Prize Cases, 67 U.S. (2 Black) 635 (1863).

<sup>31</sup> It provides that "The executive Power shall be vested in a President of the United States of America," (art. II § 1) and that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . ." (art. II, § 2).

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trast, the enumeration of the powers of Congress on the same subject is detailed.

The Constitution, in part, provides:

The Congress shall have Power to . . . provide for the common Defence and general Welfare of the United States; . . .

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Savy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union. suppress Insurrections and repel Invasions; . . . aa

The principal sections of immediate inquiry, however, relating to the regularly established armed forces are those declaring that Congress shall have the power "To declare War" and also the power "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer term than two Years."<sup>33</sup>

The clause granting Congress power "To make Rules for the Government and Regulation of the land and naval Forces" was included in the final draft of the Constitution without either discussion or debate. Neither the original draft presented to the convention by Mr. Charles Pinckney<sup>34</sup> nor the draft submitted by the "Committee of Detail" contained the clause.<sup>35</sup> It refers principally to the internal administration of the armed forces.<sup>36</sup>

### B. THE DECLARATION OF WAR AND ITS EFFECT

The Constitution, as finally approved, was written by the Committee on Details and Style.<sup>37</sup> In the initial draft, Congress was given the power "To make war" and also "to raise armies".<sup>38</sup> The initial draft,

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<sup>32</sup> U.S. CONST. art. I, § 8.

<sup>33</sup> *Ibid.*

<sup>34</sup> 5 ELLIOTT, DEBATES OF THE ADOPTION OF THE FEDERAL CONSTITUTION 130 (rev. ed. 1888).

<sup>35</sup> *Id.* at 379.

<sup>36</sup> See, e.g., *Ex Parte Quirin*, 311 U.S. 1, 26 (1942), in which the distinction was made as follows: "The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces . . ."

<sup>37</sup> See 5 ELLIOTT, *op. cit.* *supra* note 34, at 376 for the draft as originally submitted by the committee.

<sup>38</sup> *Id.* at 379.

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as well as that ultimately adopted, left to the President the command of the armed forces.<sup>39</sup> There was never any disagreement as to where the power of command should be placed. In the final draft, the words "to make war" were changed by convention vote "to declare war". In a debate over the war power, an objection was raised to the assignment of "making war" to the legislative on the basis that Congress was too cumbersome a body, "its proceedings were too slow", to exercise such powers. In the alternative, it was suggested that the authority should be vested in the Senate or given to the President. Thereafter it was moved to insert "declare" striking out "make war", leaving to the Executive the power to repel sudden attacks. Protests were raised against "a motion to empower the Executive alone to declare war." On a vote of eight states to one "declare" was chosen, with an explanation that "'make' war might be understood to 'conduct' it which was an Executive function . . ."<sup>40</sup>

The New York State convention called to consider the proposed constitution revealed dissatisfaction with even this arrangement. It debated, without further action, amendments to require a two-thirds vote of Congress to declare war and another providing "that the President of the United States should never command the army, militia, or navy of the United States, in person, without the consent of the Congress . . ."<sup>41</sup>

The uncertainty attendant upon the scope of the power of Congress to declare war was soon graphically illustrated when President Jefferson, without congressional authority, sent a fleet into the Mediterranean where it engaged in a naval battle with the Tripolitan fleet with orders to protect United States shipping against a blockade and threatened attack. He sent a message to Congress on December 8, 1801 in which, after relating that a Tripolitan cruiser had been captured, "after a heavy slaughter of her men, without the loss of a single one on our part" he stated that:

Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function

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<sup>39</sup> Id. at 380.

<sup>40</sup> 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-319 (rev. ed. 1937).

<sup>41</sup> 2 ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 407-408 (2d ed. 1896).

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confided by the Constitution to the Legislature exclusively, their judgement may form itself on a knowledge and consideration. of every circumstance of weight.”

Hamilton disagreed with this interpretation of the Constitution. The Constitution meant, he said,

that it is the peculiar and exclusive province of Congress, when the nation is at peace, to change that state into a state of war; whether from calculations of policy or from provocations or injuries received; in other words, it belongs to Congress only, to go to war. But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact already at war, and any declaration on the part of Congress is nugatory; it is at least unnecessary. . . .<sup>43</sup>

The extent of the grant of increased presidential powers by a congressional declaration of war was considered in *Brown v. United States*,<sup>44</sup> where it was said that enemy property found in the United States could not be condemned without a legislative act authorizing its confiscation. The opinion of the Court, delivered by Chief Justice Marshall contained the statement:

That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government. . . .<sup>45</sup>

Justice Story dissented, contending that when there has been a declaration of war, if

there be a limit imposed as to the extent to which hostilities may be carried by the executive . . . the executive cannot lawfully transcend that limit; but if no such limit exist, the war may be carried on according to the principles of the modern law of nations, and enforced when and where, and on what property the executive chooses.<sup>46</sup>

In any event, it is clear that in the absence of legislative limitations, only the “law of war” limits the President’s war powers, with respect to the enemy, once Congress has declared war.

The power of Congress *alone* to declare war is somewhat tempered when consideration is given to the fact that the President by *his actions* can produce a state of war. Former President Taft wrote that “Under the Constitution, only Congress has the power to declare war, but with

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<sup>42</sup> 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 326 (1896).

<sup>43</sup> MORRIS, ALEXANDER HAMILTON AND THE FOUNDING OF THE NATION 526 (1957). The article was anonymously written by Hamilton using the name of “Lucius Crassus.”

<sup>44</sup> 12 U.S. (8 Cranch) 110 (1814).

<sup>45</sup> *Id.* at 125–126.

<sup>46</sup> *Id.* at 147.

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the army and navy, the President can take action such as to involve the country in war and to leave Congress no option but to declare it or recognize its existence.”<sup>47</sup> Former President Hoover summed up this dichotomy of authority as follows:

All Presidents of the United States up until the year 1940 or thereabouts realized that here was a twilight zone of authority presenting many difficulties. There is a twilight zone between the authority of Congress to declare war and the implied constitutional authority to regulate our armed forces on one side and the authority of the Commander in Chief on the other. The attitude of all Presidents up to that time, including Jefferson, Adams, and Wilson, was that American Armed Forces should only be used in foreign countries where there was a question of acute danger, immediate danger to American life and property, and that they should not be used in any situation that was likely to create a war without an authority from the Congress.\*

While a war may be started without a formal declaration, historically, Congress has followed the start of a major conflict by a declaration of war, most often phrased in language recognizing its existence. As an illustration, in January **1846**, President Polk had ordered General Taylor to occupy disputed territory where there was a strong likelihood that the Mexicans might resist. Polk himself was uncertain what would come of it. The Mexican government protested and then in April attacked a party of our cavalry.<sup>48</sup> Confronted with an accomplished fact, a bill recognizing the existence of a state of war passed in the House on May **11, 1846**, shortly after Polk’s message was read. The vote was **174 to 14**.<sup>50</sup> The Senate approved **40 to 2** the next day.<sup>51</sup>

There is no question but that a formal declaration of war by Congress serves to transfer some intangible quantum of power to the President. In time of war “he is entitled to exercise his specifically given powers more vigorously than in time of peace, and Congress is, as a matter of expediency, compelled to grant to him wide discretionary statutory powers.”<sup>52</sup> This was recognized in a debate in the House of Represen-

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<sup>47</sup> TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 94 (1916).

<sup>48</sup> *Hearings before the Committee on Foreign Relations and the Committee on Armed Services United States Senate, on S. Con. Res. 8, a concurrent Resolution Relative to the Assignment of Ground Forces of the United States to Duty in the European Area*, 82d Cong., 1st Sess. [hereinafter cited as 1961 *Hearings*] 729 (1951).

“See CONG. GLOBE, 29th Cong., 1st Sess. 782 (1846), for the message of the President to the Congress on May 11, 1846, detailing what had transpired.

<sup>50</sup> *Id.* at 795.

<sup>51</sup> *Id.* at 804. There are other illustrations as the War of 1812, the Spanish-American War of 1898, World War I and World War II. For an account of “nine wars and a hundred military operations, 1789–1945,” see, ROGERS, *WORLD POLICING AND THE CONSTITUTION* (1945).

<sup>52</sup> 3 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 1565 (2d ed. 1929).

tatives, on May 25, 1836. John Quincy Adams, after stating that the authority given to Congress by the Constitution of the United States to declare war serves to confer all the powers incidental to war upon the government of the United States, expressed the opinion that there are '(two classes of powers, altogether different in their nature, and often incompatible with each other—the war power and the peace power. The peace power is limited by regulations and restricted by provisions prescribed within the Constitution itself. The war power is limited only by the laws and usages of nations.'<sup>53</sup>

### C. APPROPRIATIONS AND RAISING AND SUPPORTING ARMIES

The Constitution provides that Congress shall have the power "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years . . ." This provision clearly and expressly places in Congress the power to raise and support armies, thereby placing on Congress primary responsibility for supplying the armed forces.<sup>54</sup> The limitation on the period for which monies could be appropriated was intended to require the legislature of the United States "once at least in every two years, to deliberate upon the propriety of keeping a military force on foot."<sup>55</sup> This provision apparently was evolved from the practice in England of the passage each year of the "Army (Annual) Act" upon which the very existence of the British Army has depended.<sup>56</sup>

In practice, the theoretical power of Congress to control the armed forces through its control over appropriations has not proven to be as effective as might be supposed.

In 1845, George Bancroft, Secretary of the Navy, founded the Naval Academy at Annapolis on his own initiative using funds from the general appropriation for his department. He did this knowing of the many prior unsuccessful attempts over the years to induce Congress to authorize the establishment of such an institution.<sup>57</sup> A letter from the Secretary of the Navy to the newly designated superintendent, dated August 7, 1845, reveals how this was accomplished:

The Secretary of War, with the assent of the President, is prepared to transfer Fort Severn to the Navy Department for the purpose of establishing there a school for midshipmen.

<sup>53</sup> 12 *Cosc. Deb.*, 24th Cong., 1st Sess. 4038 (1836).

<sup>54</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952) (Jackson, J., concurring.)

<sup>55</sup> *THE FEDERALIST* No. 26, at 168 (Cooke ed. 1961) (Hamilton).

<sup>56</sup> See p. 49 *supra*.

<sup>57</sup> See, e.g., *CONG. GLOBE*, 28th Cong., 1st Sess. 153, 176, 611 (1844); *CONG. GLOBE*, 28th Cong., 2d Sess. 13, 128, 266 (1845).

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In carrying this design into effect, it is my desire to avoid all unnecessary expense; to create no places of easy service, no commands that are not strictly necessary; to incur no charge that may demand new annual appropriations, but by a more wise application of moneys already appropriated and offices already authorized, to provide for the better education of the young officers of the Navy. It is my design not to create new offices, but by economy of administration to give vigor of action to those which at present are available; not to invoke new legislation, but to execute more effectually existing laws. . . . One great difficulty remains to be considered. . . . The laws of the United States do not sanction a preliminary school for the navy. . . . Do not be discouraged by the many inconveniences and difficulties which you will certainly encounter, and rely implicitly on this Department as disposed to second and sustain you under the law in every effort to improve the character of the younger branch of the service.<sup>58</sup>

The school was opened in October, The report of the Secretary of the Navy, December 1, 1845 described what had been done. It included the thought that: "Let not Congress infer that new expenses are to be incurred. Less than the amount that has hitherto been at the disposition of the Department for the purposes of culture, will support the school, and repair and enlarge the quarters received from the hospitality of the army."<sup>59</sup> Congress, confronted with an accomplished fact, eventually appropriated, on a continuing basis, ample funds for the institution despite strong initial resistance.<sup>60</sup>

Using a similar approach, President Theodore Roosevelt was enabled to send the fleet around the world despite the initial lack of appropriations. In his autobiography he described the incident as follows:

There were various amusing features connected with the trip. Most of the wealthy people and "leaders of opinion" in the Eastern cities were panic-struck at the proposal to take the fleet away from Atlantic waters. The great New York dailies issued frantic appeals to Congress to stop the fleet from going. The head of the Senate Committee on Naval Affairs announced that the fleet should not go and could not go because Congress would refuse to appropriate the money—he being from an Eastern seaboard State. However, I announced in response that I had enough money to take the fleet around to the Pacific anyhow, that the fleet would certainly go, and that if Congress did not choose to appropriate enough money to get the fleet back, why, it would stay in the Pacific. There was no further difficulty about the money.<sup>61</sup>

During the Boxer Rebellion in China in 1900–01, President McKinley sent about 5,000 troops to join with the British, Russian, Ger-

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<sup>58</sup> The letter is quoted in CRANE & KIELEY, UNITED STATES NAVAL ACADEMY—THE FIRST HUNDRED YEARS 22 (1945), which also contains a detailed narration of the incident. See also LEWIS, ADMIRAL FRANKLIN BUCHANAN 92 (1929); PULESTON, ANNAPOLIS—GANGWAY TO THE QUARTERDECK 48-69 (1942); SPROUT, THE RISE OF AMERICAN NAVAL POWER 53-55 (1939).

<sup>59</sup> CONG. GLOBE, App., 29th Cong., 1st Sess. 17 (1846).

<sup>60</sup> See CONG. GLOBE, 29th Cong., 1st Sess. 972 (1846).

<sup>61</sup> ROOSEVELT, THEODORE ROOSEVELT—AN AUTOBIOGRAPHY 592 (1913).

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man, French, and Japanese troops to relieve the siege of the foreign quarters in Peking and reestablish the treaty status. This was done without express congressional authority. At the time, sufficient armed forces were available mobilized for the Spanish-American War and the Philippine Insurrection. The President sought no authority from Congress, Reports were made to Congress principally by Presidential messages. Congress made the necessary appropriations.<sup>62</sup>

At times unsuccessful efforts have been made to attach riders to the annual appropriation act limiting the authority of the President over the armed forces.

An amendment was proposed in 1912 in the Senate to the Army Appropriation Bill restricting, except as therein provided, the use of moneys appropriated for the pay or supplies of any part of the Army of the United States employed or stationed in any country or territory beyond the jurisdiction of the laws of the United States, or in going to or returning from points within the same.<sup>63</sup> The amendment was defeated.<sup>64</sup> With respect to a similar proposal in 1922,<sup>65</sup> Representative Mann stated that:

We could provide in this bill that no part of this money should be paid to anybody in the Army but red-headed men or blue-eyed men. Having this power to make an appropriation, we can put a limitation in as to whom it may be paid to and whom it may not be paid to.<sup>66</sup>

The proposed amendment was not adopted.<sup>67</sup> Again in 1928<sup>68</sup> and 1951<sup>69</sup> similar proposals were rejected. At the time such proposal was considered in 1928 Senator Borah stated: "But if the Army is in existence, if the Navy is in existence, if it is subject to command, he [the President] may send it where he will in the discharge of his duty to protect the life and property of American citizens. Undoubtedly he could send it, although the money were not in the Treasury." <sup>70</sup>

The practical difficulties of controlling the armed forces through appropriations has been expressed by Congressmen. Representative

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<sup>62</sup> See ROGERS. *op. cit. supra* note 51, at 61-62; TAFT, *op. cit. supra* note 47. at 114-115.

<sup>63</sup> 48 CONG. REC. 10921 (1912).

<sup>64</sup> *Id.* at 10930.

<sup>65</sup> 62 CONG. REC. 4295 (1922).

<sup>66</sup> *Ibid.*

<sup>67</sup> See *id.* at 4295-4301.

<sup>68</sup> 69 CONG. REC. 6744-6762 (1928).

<sup>69</sup> See 1951 Hearings, *supra* note 48.

<sup>70</sup> 69 CONG. REC. 6760 (1928).

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Clare Hoffman of Michigan has expressed the attitude of Congress as follows :

We have one-hundred-and-seventy-odd committees, joint committees of the Army and Navy trying to coordinate, trying to get away from the waste and extravagance which is inevitable when either the Army or the Navy plans a war. No one criticizes them for it. For myself, if they ask for \$5, and I am assured \$2 of it will be wasted, nevertheless I would vote for the five and so would the other members of Congress, because we do not dare to take a chance, and we do not know the exact amount they may need.”

Senator Robert A. Taft in advancing a contrary position stated that Congress

could refuse to appropriate the money necessary for the Army. Of course that is a wholly useless power. It may well be that we need an Army of 3½ million men simply to defend the United States itself. Surely Congress is not limited to providing the money for those men without any voice in the decision as to what they are needed for or where they are to be used. How could we decide whether we need 3½ million men until we know what we need these men for? And for what purpose are they to be used? The power of the purse amounts to nothing, because we may feel that 3½ million men are necessary and still disapprove [their deployment].<sup>72</sup>

Senator Wherry on one occasion stated that “You say you control the size of the Army by appropriations. I say as a member of the Appropriations Committee you cannot control the appropriation of the Army. There are commitments that are already made . . . It is impossible to control the appropriations.”<sup>73</sup> He further stated that:

When you get into war you appropriate whatever the needs are without question. I remember one time that we appropriated nearly \$100,000,000 with no comment on the floor; there are many instances where an appropriation cannot be controlled by the Appropriations Committee because it has to go along with commitments. All you do is help justify it, maybe cut it down in an item here or an item there. I am not going to go into past history, but commitments we have made have involved us in maximum appropriations, on which we could not possibly withhold the appropriation, for it was impossible.“

### IV. THE POWER OF THE PRESIDENT

#### A. GENERAL

The Constitution of the United States provides that “The executive Power shall be vested in a President of the United States of America”<sup>75</sup> and that “The President shall be Commander in Chief of the Army and

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<sup>71</sup> 93 CONG. REC. 9434 (1947).

<sup>72</sup> 1961 *Hearings supra* note 48, at 608.

<sup>73</sup> *Id.* at 516.

<sup>74</sup> *Ibid.*

<sup>75</sup> Art. 11, § 1.

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Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”<sup>76</sup>

Hamilton analogized the authority thus granted the President as follows:

In most of these particulars the power of the President will resemble equally that of the King of Great Britain and of the Governor of New York. The most material points of difference are these—First; the President will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union. The King of Great Britain and the Governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article therefore the power of the President would be inferior to that of either the Monarch or the Governor. Secondly; the President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulation* of fleets and armies; all of which by the Constitution under consideration would appertain to the Legislature.”

While the foregoing analogy serves as a rough guide, the opinion has been expressed that in the distribution of political power between the departments of government “there is such a wide difference between the power conferred on the President . . . and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them . . . .” “The Constitution itself must be, and in fact is, the only basic criteria.”<sup>78</sup>

Once the nation is at war, regardless of whether initiated by declaration, invasion, or insurrection, the whole power of conducting it, as to manner, method, and means is for Presidential determination. He is the sole judge of the nature and extent of the exigencies, necessities, and duties demanded by the occasion.<sup>79</sup>

It is evident that the framers of the Constitution intended “to vest in the President the supreme command over all the military forces—such

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<sup>76</sup> Art. 11, § 2.

<sup>77</sup> **THE FEDERALIST** No. 69, at 464 (Cooke ed. 1961) (Hamilton),

<sup>78</sup> Fleming v. Page, 50 U.S. (9 How.) 603, 618 (1850).

<sup>79</sup> See Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

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supreme and undivided command as would be necessary to the prosecution of a successful war.”<sup>80</sup>

[The President, as Commander in Chief] . . . is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harrass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States?’

The considerations behind the intention of vesting supreme power of control in the President were well explained by Hamilton when he stated that of all the functions of government,

the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority?’

*Durand v. Hollins*,<sup>83</sup> a case decided by Justice Nelson of the Supreme Court while acting as a trial judge, brought into question the President’s authority to employ troops overseas. In 1854, the defendant, a commander of an American war vessel was ordered to get reparation for an earlier attack and acts of violence against citizens of the United States and their property located in Nicaragua. He caused the bombardment and setting afire of sections of San Juan del Norte, Nicaragua. A private person who was there sued the naval officer for damages to his property. The court held that the complainant had no rights against the officer. The President could authorize such action in connection with protection of American lives or property. It rested “in his discretion.” The defendant was simply obeying lawful orders. The President could employ the army or navy to destroy property abroad when he so desired and the court would not question his authority—it was a question “which belonged to the Executive to determine; and his decision is final and conclusive, and justified the defendant in the execution of his orders given through the Secretary of the Navy.”<sup>84</sup>

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<sup>80</sup> U. S. v. Sweeny, 157 U.S. 281, 284 (1895). Lincoln, in his First Annual Message, December 3, 1861, with reference to the absolute necessity of single, unified command of the army stated: “It has been said that one bad general is better than two good ones, and the saying is true if taken to mean no more than that an army is better directed by a single mind, though inferior, than by two superior ones at variance and cross-purposes with each other.” 6 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 44, 56 (1897).

<sup>81</sup> Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

<sup>82</sup> THE FEDERALIST No. 74, at 500 (Cooke ed. 1961) (Hamilton).

<sup>83</sup> 4 Blatchf. C.C. 451 (C.C.S.D.N.Y. 1860).

<sup>84</sup> *Id.* at 455.

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In *Ex parte Quirin*,<sup>85</sup> the Supreme Court, in considering the power of the President, stated: "The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces. . . ."

Broad as the President's powers may be, some limitations do exist. The Constitution provides that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." <sup>86</sup> With respect to the President it is provided that "he shall take Care that the Laws be faithfully executed . . . ." <sup>87</sup>

As early as 1804 the Supreme Court recognized that the power of the President as commander in chief must be exercised in conformity with lawful acts of Congress. If not, his orders will afford no protection to an officer acting under them.<sup>88</sup> "It has not yet been definitely established to what extent the President, as Commander in Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law . . . in time of peace, or in time of war."<sup>89</sup> Thus there appears to be an intangible area wherein the Congress may, to some extent, control the President's power as commander in chief by legislation.

Where Congress is silent, the opinion has been expressed that, when war has been declared by Congress

[The President is governed] . . . by the law of nations as applied to a state of war. Whatever act is legitimate, whatever act is approved by the law, or hostilities among civilized nations, such he may, in his discretion, adopt and exercise; for with him the sovereignty of the nation rests as to the execution of the laws. If any of such acts are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the executive must have all the right of modern warfare vested in him, to be exercised in his sound discretion, or he can have none.<sup>90</sup>

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<sup>85</sup> 317 U.S. 1, 26 (1942). The case upheld the conviction, by military commission, of enemy German saboteurs captured in the United States.

<sup>86</sup> Art. VI.

"Art. 11, § 3.

<sup>88</sup> *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

<sup>89</sup> *Reid v. Covert*, 354 U.S. 1, 38 (1957).

<sup>90</sup> *Brown v. United States*, 12 U.S. (8 Cranch) 110, 149 (1814) (Story, J., dissenting).

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In contrast to the above view, that in the absence of legislative limitations, the President has broad discretion, the thought has been expressed that the provision of the Constitution that "The President shall be Commander in Chief of the Army and Navy of the United States . . ." implies

. . . something more than an empty title. . . . It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy. . . . No doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.<sup>91</sup>

### B. *SOLIDIFICATIO OF THE PRESIDENT'S POWER*

Under President Lincoln, the clause providing that the President "shall be Commander in Chief of the Army and Navy" was utilized as the basis of the exercise of great powers. This was done by interpreting it in conjunction with the clause making it a duty of the President to "take Care that the Laws be faithfully executed."<sup>92</sup> The cumulative effect of the combined interpretation of these two clauses was termed by Lincoln his "war powers."<sup>93</sup> This amalgamation served as justification for a series of emergency actions taken by him during the interval between the evacuation of Fort Sumter, April 14, 1861, and the convening of Congress in special session on July 4, 1861. Among other measures, during this period, Lincoln called 42,034 volunteers for three years service, directed that the Regular Army of the United States be increased by the addition of eight regiments of infantry, one regiment of cavalry, and one regiment of artillery making a maximum aggregate increase of 22,714 officers and enlisted men, and added 18,000 to the navy,<sup>94</sup> expended two million dollars of public funds in the treasury, without authority of law, to "unofficial persons,"<sup>95</sup> and proclaimed a

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<sup>91</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

<sup>92</sup> See 6 RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 20, 25 (1897). In his message of July 4, 1861, Lincoln stated: "The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one third of the States . . . Are all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated?"

<sup>93</sup> See *id.* at 20, 31. Lincoln stated that "It was with the deepest regret that the Executive found the duty of employing the war power in defense of the Government forced upon him."

<sup>94</sup> Proclamation, May 3, 1861. *Id.* at 16.

<sup>95</sup> Special Message to Congress, May 26, 1862. *Id.* at 77, 78-79.

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blockade of southern ports<sup>96</sup>—all of this substantially without statutory authority.<sup>97</sup>

With respect to the extent of the President's power, there is a divergence of views going from a very conservative position that the Chief Executive may act only as authorized, to the other extreme perhaps best illustrated by President Theodore Roosevelt's "Stewardship Theory" of the Presidency. In his autobiography he stated that he had insisted:

upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people, bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some special authority to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition. I did not care a rap for the mere form and show of power; I cared immensely for the use that could be made of the substance.<sup>98</sup>

In following this same line of reasoning, the conclusion has been drawn that the authority granted the President by the Constitution may not be interfered with by Congress. Ex-President William H. Taft wrote: "Two principles, limiting congressional interference with the Executive powers, are clear: *First*, Congress may not exercise any of the powers vested in the President, and *second*, it may not prevent or obstruct the use of means given him by the Constitution for the exercise of those powers."<sup>99</sup>

While the President may have power to act independently of Congressional authority, the support of Congress is always desirable—if

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<sup>96</sup> Proclamation. April 19, 1861. *Id.* at 14.

<sup>97</sup> "See Message to the Special Session of Congress, July 4, 1861. *Id.* at 20, 24. Lincoln stated: "These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress." See also Special Message to Congress, May 26, 1862. *Id.* at 77, 78; CORWIN, *THE PRESIDENT—OFFICE AND POWERS* 229 (4th rev. ed. 1957).

<sup>98</sup> ROOSEVELT, *THEODORE ROOSEVELT—AN AUTOBIOGRAPHY* 388–389 (1913).

<sup>99</sup> TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 126 (1916).

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obtainable. On March 12, 1917, President Wilson met the renewal by Germany of unrestricted submarine warfare by ordering an armed guard to be placed on all American merchant vessels.<sup>100</sup> This was only done after an unsuccessful effort to obtain Congressional authorization.<sup>101</sup> In his unsuccessful request to Congress for such authority, delivered at a joint session on February 26, 1917, he had said, "No doubt I already possess that authority without special warrant of law, by the plain implication of my constitutional duties and powers; but I prefer, in the present circumstances, not to act upon general implication. I wish to feel the authority and the power of the Congress are behind me in whatever it may become necessary for me to do."<sup>102</sup>

The wide scope of the war powers assumed by President Roosevelt is perhaps no more graphically illustrated than in his demand to Congress on September 7, 1942 that it repeal certain provisions of the Emergency Price Control Act. He stated:

I ask the Congress to take this action by the first of October. Inaction on your part by that date will leave me with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos.

In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act. . . .

The President has the powers, under the Constitution and under congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war.

I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress. . . .

The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and the country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our safety demands such defeat.

When the war is won, the powers under which I act automatically revert to the people—to whom they belong.<sup>108</sup>

President Harry S. Truman in a news conference on January 11, 1951, most emphatically claimed his sole power to control the placement of the armed forces. He declared that he would "consult with Congress"

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<sup>100</sup> See 55 CONG. REC. 102-104 (1917) (address by President Wilson delivered to a joint session of Congress, April 2, 1917).

<sup>101</sup> See 54 CONG. REC. 5009-5020 (1917).

<sup>102</sup> 54 CONG. REC. 4272-4273 (1917) (address by President Wilson delivered to a joint session of Congress, February 26, 1917).

<sup>108</sup> 88 CONG. REC. 7042, 7044 (1942).

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before sending American troops to Europe, as part of the arrangements under the North Atlantic Treaty, "but made it clear he would not seek Congressional permission to do so." He vigorously accepted "the challenge of those in Congress who would seek to exercise control over such troop commitments by tying up military appropriations. If they wanted to go to the country on that, Mr. Truman said, he would go with them."<sup>104</sup>

History substantiates the view that in practice the President has had unfettered operational control over the employment and use of the armed forces overseas.

### V. CONCLUSIOS

In theory, the division of power between the President and Congress over the armed forces is clear and not susceptible to misinterpretation. In *Ex Parte Milligan*,<sup>105</sup> the Supreme Court summarized the general inter-relationship and scope of authority between the legislative and the executive branches of government as follows:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences. . . .<sup>106</sup>

Despite the simplicity of the relationship, in theory, large areas of overlap exist in practice. While often an effort is made to seek a clear line of demarcation between the powers of the President and those of Congress, in actuality there is considerable overlap. Often the assumption is made that there either is a power that can be exercised by the Congress and not by the President or a power than can be exercised by

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<sup>104</sup> N.Y. Herald Tribune, Jan. 12, 1951, quoted in 97 *Cosc. REC.* at 487 (1951) (remarks of Senator Kem).

<sup>105</sup> 71 U.S. (4 Wall.) 2 (1866).

<sup>106</sup> *Id.* at 139-40 (Chase, C.J., concurring).

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the President and not by Congress, In actuality, there are areas, conceivably, where the President can act independently of congressional authority, but where, nevertheless, the Congress has the authority to limit the President to some extent.<sup>107</sup>

In consequence, because of the intangible area where the respective powers of the President and of Congress overlap, disagreement occur. As has been stated in a recent editorial in *The New York Times*, "The struggle for power between the executive and legislative branches of the American Government is even older than the Constitution of the United States. It began as soon as the original thirteen colonies chose a Continental Congress." This struggle has continued, to a greater or lesser extent, to the present time. It is a contest that persists almost uninterruptedly.<sup>108</sup>

The entire question of constitutional power of the President to control the armed forces was extensively considered in Congress early in 1951, when the authority of the executive in this regard was challenged. On January 8, 1951 Senator Wherry introduced a resolution prohibiting the assignment of ground forces of the United States "to duty in the European area for the purposes of the North Atlantic Treaty pending the formulation of a policy with respect thereto by the Congress."<sup>109</sup> Earlier, on January 3, 1951, Representative Coudert had introduced a similar joint resolution "requiring congressional authorization for sending military forces abroad."<sup>110</sup>

After voluminous hearings, no definitive conclusion was reached. The hearings were extensive. Detailed testimony was received concerning the respective powers of Congress and of the President over the armed forces. The final report submitted by the joint congressional committee, included the following summary :

Some witnesses before the committee took the position that the President would be usurping a congressional function in sending American troops abroad in time of peace to serve as part of what was described as an "international army". Others maintained that if the President has authority to send American troops abroad in time of war or for the protection of American lives and property, he also has the duty in time of peace to organize our defenses in the most effective way to assure victory if the security of the United States should be endangered by an attack anywhere; this includes authority for the President to put American troops into an integrated defense force if advisable.

No question was raised as to the authority of the President to send American troops to enemy territory to serve as part of an occupation army, which of

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<sup>107</sup> See 1961 *Hearings supra* note 48, at 124 (remarks of Senator Morse).

<sup>108</sup> N.Y. Times, Jan. 13, 1964, p. 34, col. 1 (city ed.).

<sup>109</sup> S. Res. 8, 82d Cong., 1st Sess. (1951).

<sup>110</sup> H.R.J. Res. 9, 82d Cong., 1st Sess. (1951).

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course is the situation with respect to Germany, Austria and Japan, with whom formal peace treaties have not yet been concluded.

With the exact line of authority between the President and the Congress in doubt for the past 160 years, the committee did not endeavor to resolve this issue definitely at this time.”

Part of the difficulty in resolving the problem is that there has been, from the very inception of the formation of the United States, standby statutory authority granting the President great power over the armed forces. Among the most significant of these are the Acts of Congress of February 28, 1795 and March 3, 1807 which have remained effective, in modified form, to the present time.<sup>112</sup> Under these statutes, the President was authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrections against the government of a state or of the United States. These statutes served as a basis, in part, for the holding of the Supreme Court in the *Prize Cases*<sup>113</sup> that President Lincoln had a right to institute a blockade of ports in possession of the Confederate States despite the absence of specific congressional authorization to do so. The foregoing statutes and others of a similar vein serve as a specific grant from Congress to the President of broad general powers over the armed forces.<sup>114</sup>

Perhaps the strongest factor supporting the contention that the President has complete operational control, overseas, with respect to the armed forces is his complete and exclusive authority concerning the actual conduct of relations with foreign nations. In *United States v. Curtiss-Wright Export Corporation*<sup>115</sup> the Supreme Court stated:

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<sup>112</sup> S. REPT. NO. 175, 82d Cong., 1st Sess. 18 (1951).

<sup>113</sup> See 10 U.S.C. 331 which provides: “Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.” See also 10 U.S.C. 332 (use of militia and armed forces to enforce Federal authority); 10 U.S.C. 333 (interference with State and Federal law); 10 U.S.C. 334 (Proclamation to disperse); 10 U.S.C. 351 (during war or threat to national security the President “may arm, have armed, or allow to be armed, any watercraft or aircraft . . .”).

<sup>114</sup> 67 U.S. (2 Black) 635, 668 (1863).

<sup>115</sup> See *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29-30 (1827), wherein it was stated that “[T]he power confided by Congress to the President [by the act of 1795] is doubtless of a very high and delicate nature . . . . It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion . . . . The authority to decide whether the exigency has arisen, belongs exclusively to the President, and . . . his decision is conclusive upon all other persons.”

<sup>116</sup> 299 U.S. 304 (1936).

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Not only, as we have shown, is the Federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited, in this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>116</sup>

Once the Congress, through its power to "raise and support armies" establishes the armed forces in being, the operational control thereof is exclusively that of the President. Even assuming this not to be so, what practical control, as distinguished from theoretical control, does Congress have?

In *Mississippi v. Johnson*,<sup>117</sup> the Supreme Court, in denying an injunction against the President, poignantly recognized the limitations on the power to control, in advance, contemplated actions by the President. Impeachment is the sole, and ultimate, effective control.

Aside from the remote possibility of impeachment, the influencing of public opinion, and the effect of such opinion on the President in influencing his future plans is of paramount importance. Congress greatly influences public opinion through exercise of its investigatory functions and attendant publicity. It "can and should frequently inquire into the tactics employed, and the state of readiness, and all other military matters . . . Congress should insist on the avenues of information being open directly to the military sources in any of these matters."<sup>118</sup> "The scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."<sup>119</sup>

The extent of the investigation, within the limits of law, rests with Congress itself. For example, the "Truman Committee" in its 1943 report stated:

The committee never have investigated, and they still believe that they should not investigate, military and naval strategy or tactics.

From their inception the special committee have concerned themselves with the nonmilitary aspects of the defense program, that is to say, with seeing to it that the defense articles which the Army and Navy have determined that they need are produced in a minimum of time at a minimum of cost and with as little disruption of the civilian economy as possible.

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<sup>116</sup> *Id.* at 319.

<sup>117</sup> 71 U.S. (4 Wall.) 475, 499 (1867).

<sup>118</sup> 1961 *Hearings supra* note 48, at 482 (remarks of Mr. Harold E. Stassen).

<sup>119</sup> *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

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The committee have the utmost confidence in Admiral King, Chief of Operations of the Navy, and General Marshall, Chief of Staff of the Army, and we believe that matters of tactics and strategy should be entirely in their hands.<sup>120</sup>

A "Gallop Poll", conducted during February 1951, according to a report in *The Washington Post*, attempted to ascertain public sentiment regarding the desirability of securing the consent of Congress before using troops abroad. The poll was conducted at a time when congressional hearings on the subject were receiving considerable publicity. The vote in the national opinion survey was 2 to 1 that the President should not send an army abroad without first obtaining congressional sanction. The principle of congressional approval, before movement or employment of troops overseas, was widely upheld by the American public.<sup>121</sup>

Regardless of the question of power, or a division of power or responsibility, it is indispensable that the complete unity of the American people be behind any significant operation of the armed forces overseas. Former Secretary of State Acheson has stated, in addition, that the "American people feel that the Congress itself has certain responsibility and certain powers. I should think that the executive branch itself would be most anxious that they feel that Congress will at all times exercise that power." Nothing will ever be solved by trying to "split hairs" as to what is the authority of the Executive and what is the authority of Congress. They must act together. No strong effective policy calculated to carry out the essential can ever be accomplished without the full and complete unity of the Executive and the Congress.<sup>122</sup>

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<sup>120</sup> Special Committee Investigating the National Defense Program, *Report Concerning Conflicting War Programs*, S REP NO 10 78th Cong, 1st Sess 1 (1943).

<sup>121</sup> *Washington Post* Feb 9, 1951, quoted in 1961 *Hearings supra* note 48, at 677

<sup>122</sup> See 1951 *Hearings supra* note 48, at 99 (remarks of former Secretary of State Acheson)

# IS THERE A MILITARY COMMON LAW OF CRIMES?\*

BY CAPTAIN GUY A. ZOGHBY\*\*

## 1. INTRODUCTION

In our judgment there is little likelihood that these three powerless, buried judges in the Department of Defense will correct the obvious defects outlined above.<sup>1</sup>

It is usually stated with dogmatic certainty that there is no military common law of crimes. Like any other proposition of this sort, sufficient repetition raises it to the status of a maxim. The eventual use of meaning of the concept has become so extended as to cause surprise in many students of military law any time the Court of Military Appeals mentions common law or seeks sources outside the legislative history of the *Uniform Code of Military Justice*.<sup>2</sup> The Court of Military Appeals has been subjected to considerable criticism, for its work product,<sup>3</sup> for overturning ancient military law,<sup>4</sup> for overturning manual provisions,<sup>5</sup> for causing instability in military law,<sup>6</sup> for reading its own notions into

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\* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Twelfth Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup> Keefe and Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 151, 170 (1949). In this early article the authors were extremely concerned about the many defects they observed in the Uniform Code. Their judgment as to the power of the United States Court of Military Appeals is reproduced above because of its remarkable inaccuracy. As will be seen the Court has assumed a dominant position in the field of military justice.

<sup>2</sup> 10 U.S.C. §§ 801-940 (1958) [hereinafter cited as USMJ].

<sup>3</sup> See Avins, *New Light on the Legislative History of Desertion Through Fraudulent Enlistment: The Decline of the United States Court of Military Appeals*, 46 MINN. L. REV. 69 (1961).

<sup>4</sup> See Avins, *Proof of Desertion Through Prolonged Absence*, 44 CORNELL L.Q. 356 (1959).

<sup>5</sup> See Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U.L. REV. 861 (1959).

<sup>6</sup> See Report to Honorable Wilbur M. Brucker, Secretary of the Army, by the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army, 18 January 1960 [hereinafter referred to as the *Powell Report*].

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the law,<sup>7</sup> for discarding its prior decisions,<sup>8</sup> and finally for abuse of power.<sup>9</sup> One of the critics of the Court was even kind enough to point out why the few apologists for the court had been ineffective, indicating that they had not come to grips with the real problem of the Court's decisions but had merely engaged in tangential discussion.<sup>10</sup> It is not the purpose of this article to produce an *apologia* for the Court of Military Appeals, tangential or otherwise. However, an analysis of the sources of military criminal law, and the Court's use of those sources will, perhaps, illuminate the reason for some of the evils pointed out above and point up the true significance of the Court of Military Appeals selection and use of sources of law to decide cases.

In pursuit of the topic of this article, something more than a mere catalogue of sources used by the Court of Military Appeals is required. First, because "common law" has not and probably never will mean the same thing to all men, some definition will be required, albeit nominal.<sup>11</sup> This will involve an analysis of the federal concept of crimes, the extent to which it applies to the Court of Military Appeals and the areas in which the Court of Military Appeals can make use of the concept. In sum, a working definition of a "military common law of crimes," will be devised.

Second, the nature of Court of Military Appeals must be considered. It is clearly a creature of the Congress of the United States,<sup>12</sup> and a revolutionary one at that.<sup>13</sup> A considerable body of legal writing has been directed to a classification of the Court as either legislative or con-

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<sup>7</sup> See Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39 (1959).

<sup>8</sup> See Murphy, *The Army Defense Counsel: Unusual Ethics for an Unusual Advocate*, 61 COLUM. L. REV. 233, 246 (1961).

<sup>9</sup> See Herbert, *The Status of Spouses as Witnesses Before Courts-Martial*, 11 MIL. L. REV. 141 (1961).

<sup>10</sup> See Avins, *supra* note 3, at 71, where he says, "These controversies are only tangential to the main affliction of the Court of Military Appeals which is that the court is turning out a second-rate work product substantially below the minimum norm, in both learning and analysis, which should be required of every judicial tribunal, especially the court of last resort working in a specialized field."

Then, the author proceeds to "fully" examine the court's work product, as an institution, on the strength of two cases involving fraudulent reenlistment.

<sup>11</sup> The nominal definition is said to be arbitrary in that it is the creation of an author for use in his particular work; however, all language either written or oral is used in the context of the speaker. The definition to be offered will as far as possible be conventional, in that it attempts to conform to common usage. Concerning kinds of definitions, see generally PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* (1953).

<sup>12</sup> See UCMJ, Art. 67.

<sup>13</sup> EVERETT, *MILITARY JUSTICE IS THE ARMED FORCES OF THE UNITED STATES* 15 (1956).

stitutional or perhaps a quasi-judicial administrative agency.<sup>14</sup> While the nominal classification of the court is probably necessary for comparing the court to other federal courts, for this article, it is more important to delineate as far as possible, not the kind of court by name, but rather the type of court in terms of power and function. This will have great bearing on the sources of law the Court has available to it.

Third, because the military law is essentially a codal system, some greater reliance may be placed on sources of law not usually thought of as persuasive to the common law lawyer. Moreover, a greater degree of interpretive freedom may rest with the judges of this Court. Therefore, it seems essential that the various sources of law available to the court be analyzed and listed. However, for the sake of presentation it is felt that judgment on the sources that should be used be reserved for the conclusion of the article. This brings us to the fourth major point.

Fourth, because of the nature of power of the Court of Military Appeals, it will be seen that what the court actually does in the way of use and selection of sources of law will determine the existence or non-existence of a "military common law of crimes." Therefore, in four of the most fruitful areas, the nature and the sources of law actually used by the Court of Military Appeals will be presented and analyzed. The four areas selected as being the most fruitful, involve those offenses against the Uniform Code of Military Justice that are also proscribed and punished in civil jurisdictions, *viz.* homicides, sex crimes, crimes against property, and crimes against persons.

Finally, conclusions will be drawn as to the sources of law the court should consult and what sources, if any, should bind the court. Further, consideration will be given to the existence of a "unifying principle" which may act a lot like a "common law" in that selection and use of sources by the Court of Military Appeals can, to some extent, be predicted.

## 11. MILITARY COMMON LAW OF CRIMES — DEFINITION

If we are to make an adequate picture of a stage of legal development, the picture must be taken after the period has definitely come to an end so that we may view its phenomena, as it were, under the aspect of eternity. It is, therefore, a rash undertaking to essay even a snapshot photograph of the stage of legal development into which we are passing. But without some such attempt

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<sup>14</sup> See generally Fedele, *Appellate Review in the Military Judicial System*, 15 FED. B. J. 399 (1955); Feld, *Development of the Review and Survey Powers of the United States Court of Military Appeals*, 12 MIL. L. REV. 177 (1961); Walker, *An Evaluation of the United States Court of Military Appeals*, 48 NW. U. L. REV. 714 (1954); Wood, *The Rule-Making Power* (Unpublished thesis, Judge Advocate General's School Library. April 1963).

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we shall fail to understand one of the chief instruments by which the traditional materials of our legal system are kept in touch with reality and are made available for a changed and changing society.”

The problems posed by a changing society and an evaluation of the legal system of that society are especially present in the field of military law. The Code represents a dynamic change and the unification and reconciliation of many differences between the services, particularly in the definition of crimes.<sup>16</sup> The extensive **work** on the Code, itself, did not obviate the need for the Court of Military Appeals to continue to reconcile, the meaning of crimes, *e.g.* negligent homicide as an offense against the code.<sup>17</sup> Thus, what kind of common law can we discover for military crimes?

*Black's Law Dictionary* defines the common law as follows:

As distinguished from law created by enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and in this sense particularly the ancient unwritten law of England.”

For our purposes then, it is clear enough that the Code is not part of the common law of the military, however what can be a part of that, common law is not so clear.

The Court of Military Appeals is certainly a federal court, but the “. . . Federal Courts have no common law criminal jurisdiction.”<sup>19</sup> Numerous cases support this rather simple proposition,<sup>20</sup> but explanation is required to determine what it really means. Eminent authors have stated the rule in this language. “All crimes must be defined by an act of Congress and the statute must be within the powers conferred on Congress by the Constitution.”<sup>21</sup> The above cited cases fully support the proposition that no conduct is punishable by a federal court simply because it was a crime at common law. However, it is too great

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<sup>15</sup> POUND, *THE SPIRIT OF THE COMMON LAW* 193 (1921).

<sup>16</sup> *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess., 1238 (1949).

<sup>17</sup> See *United States v. Kirchner*, 1 USCMA 477, 4 CMR 69 (1952).

<sup>18</sup> BLACK, *LAW DICTIONARY* 345-46 (4th ed. 1951).

<sup>19</sup> HOUSEL & WALSER, *DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES* 18 (2d ed. 1946).

<sup>20</sup> See, *e.g.*, *Pettibone v. United States*, 148 U. S. 197 (1893); *Massew v. United States*, 266 Fed. 18 (2d Cir. 1920); *Paters v. United States*, 94 Fed. 127 (9th Cir. 1899). *cert. denied*, 176 U.S. 684 (1900).

<sup>21</sup> HOUSEL & WALSER, *op. cit. supra* note 19, at 18.

## MILITARY COMMON LAW

an extension of this rule to say that where a statute makes certain conduct criminal and provides for a penalty, that resort may not be had to various sources of law, even common law to assist in the interpretation of the statute. Therefore, although there are no common law crimes against the United States, the common law is looked to for the definition of the crime in all cases where the Congress merely designates an offense by its common law name.<sup>22</sup>

Colonel Winthrop in his treatise on military law has spoken of an unwritten law of the military, derived from common law principles.

While the Military Law [sic] has derived from the Common Law [sic] certain of the principles and doctrines illustrated in this code, it has also a *lex non scripta* or unwritten common law of its own. This unwritten law may be said to include: 1. The 'customs of the service', so called; 2. the unwritten laws and customs of war.<sup>23</sup>

The "military common law" that Winthrop refers to was also noted as such by the United States Supreme Court in *In re Yamashita*.<sup>24</sup> This is not the common law that this writer seeks to analyze and classify. In the former Articles of war<sup>25</sup> no attempt was made in the legislation to define the crimes proscribed. The crimes of murder, rape, manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, perjury, forgery, sodomy, assault and assault with a dangerous weapon, were lumped into two articles<sup>26</sup> to be punished as a court-martial may direct. As the legislative history of the Code shows, an attempt was made to reconcile the differing Manual interpretations given to the above crimes.<sup>27</sup> In construing and applying this new Code, the Court of Military Appeals must seek sources of law to help define these crimes further and apply them to particular fact situations, presumably as Congress intended. It is submitted that since our codal system was drafted by Congress in relation to various sources of law, and interpretation of the Court of Military Appeals will be accomplished by referring to those sources and others that are available.<sup>28</sup> It is those sources of law, outside of the

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<sup>22</sup> *In Re* Greene, 52 Fed. 104, 111 (S.D. Ohio 1896).

<sup>23</sup> WINTHROP, MILITARY LAW AND PRECEDENTS 41 (2d ed. rev. 1921).

<sup>24</sup> 327 U.S. 1 (1946).

<sup>25</sup> Ch. 11, Act of 4 June 1920, 41 Stat. 787 [hereinafter cited as Articles of War].

<sup>26</sup> Articles of War 92, 93.

<sup>27</sup> See *Hearings on H.R. 2498, supra* note 16.

<sup>28</sup> As will be seen in the conclusion, *infra*, the mandate of the Congress to the Court, at least as the Court interprets its mandate, is so broad as to allow the Court the freedom to seek the widest choice of sources of law. Eminent authority has indicated that this technique will usually result in a superior approach for an appellate court. See notes 184 and 185. *infra*.

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Code, and consisting of rules or norms that the Court of Military Appeals uses to decide cases, that constitute a working definition of a "military common law of crimes."

The purpose of this article, then, is to isolate, examine and classify those sources, in order to see if indeed there is anything that works like a common law of crimes. The decision to examine the cases decided by the Court of Military Appeals is based on the status of that Court in the system of military justice and within the framework of our federal court system. The true position of this Court is worthy of detailed examination, so that the decision to examine its cases in the search for the sources of law that create a "military common law of crimes," can be verified.

### III. THE COURT OF MILITARY APPEALS— POSITION AND POWER

While Article 67 of the *Uniform Code of Military Justice* which creates the Court of Military Appeals contains the "most revolutionary changes which have ever been incorporated into military law,"<sup>29</sup> the notion of a court of military appeals with civilian judges appointed by the President is not so recent. In fact, a bill was introduced in the Senate in the first session of the 66th Congress (1919) to create just such a court.<sup>30</sup> The amended bill reported out of committee was enacted into law and became known as the 1920 Articles of War; however, reference to an appellate court made up of civilians was deleted.<sup>31</sup> The idea of such a court lingered on, but it was not until the adoption of the *Uniform Code of Military Justice* that such a court became a reality.

The various authors that have tried to fit the Court, if indeed it is a Court, into the legislative or constitutional division have found little difficulty in saying that it is not a constitutional court.<sup>32</sup> The four tests usually cited as determinatives are:

- (1) Are the judges protected in tenure and compensation during good behavior?
- (2) Does the geographical location comport with Article III?
- (3) Can the judges exercise Article III jurisdiction?
- (4) Did Congress intend to create the court under Article III?

#### A. CONGRESSIONAL INTENT

An examination of the cases decided by the Supreme Court will show that at least some members of the Court consider the key factor, in classifying a federal court, to be the intent of Congress.

<sup>29</sup> H.R. REP. NO. 491, 81st Cong., 1st Sess., 6 (1949)

<sup>30</sup> *Powell Report*, *supra* note 6, at 262.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Supra* note 14.

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In *Glidden Co. v. Zdanok*<sup>33</sup> three judges of the Supreme Court, disapproving earlier decisions,<sup>34</sup> held that the judges of the Court of Claims and the Court of Customs and Patent Appeals were judges in the sense of Article III and could sit as substitute judges of courts hitherto clearly recognized as constitutional courts.<sup>35</sup> The Justices appeared to give emphasis to the fact that the judges of the Court of Claims and the Court of Customs and Patent Appeals had been protected in tenure and compensation and retired judges are presently so protected. However, the maximum emphasis seems to have been given to the intention of Congress, in that the Justices said that the judges deciding the *Bakelite*<sup>36</sup> and *Williams*<sup>37</sup> cases were handicapped in not being able to ascertain the true intention of Congress. Later enactments of Congress, embodied in changes to Title 28 United States Code make it clear that Congress intended, at least by the time of the *Glidden*<sup>38</sup> decision, to make these courts constitutional courts.<sup>39</sup>

As stated in the introduction to this article the nominal classification of the Court of Military Appeals is not of great moment for its purpose, the principal need being to determine the power and position of the Court as bearing on its ability to select sources of law and impose its selection on the interpretative meanings of the articles of the *Uniform Code of Military Justice*. Because of the decision in *Glidden*<sup>40</sup> and the underlying reasons, it is submitted that the best source for determining the true power and position of the Court of Military Appeals is the legislative history preceding the adoption of the *Uniform Code of Military Justice* and the subsequent action of Congress concerning the Court.

In the initial hearings before the subcommittee of House Armed Services Committee the following colloquy occurred:

DR. MORGAN: Well, we provide for a review by this civilian authority. First, of course, we have the Judicial Council set up in the Military Establishment. The members of the council must be civilians and they are appointed by the President. . . . They are really a *military court of last resort*. [emphasis added]

MR. RIVERS: These are the three civilians you are talking about?

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<sup>33</sup> 370 U.S. 530 (1962).

<sup>34</sup> *Williams v. United States*, 289 U.S. 553 (1933); *Ex parte Bakelite Corp. v. United States*, 279 U.S. 438 (1929).

<sup>35</sup> There was no majority opinion.

<sup>36</sup> *Ex parte Bakelite Corp. v. United States*, 279 U.S. 438 (1933).

<sup>37</sup> *Williams v. United States*, 289 U.S. 553 (1933).

<sup>38</sup> *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

<sup>39</sup> 28 U.S.C. §§ 171, 211 (1958).

<sup>40</sup> *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

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DR. MORGAS: Yes, that is right. We have called it a Judicial Council, using the language of the Elston bill. It is really 'a *supreme judicial military court*; it is composed entirely of civilians. [emphasis added]. . . .

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MR. DURHAM: Who passes on questions of law?

DR. MORGAS: Why the judicial council would. That is, the court of last resort would determine whether it was a question of law or a question of fact.<sup>41</sup>

There seems to be little doubt in the mind of Professor Morgan that his court was truly a kind of supreme court of military law. Nor do the comments of the committee members seem to indicate any different feeling in the members of the committee. It seemed generally accepted that this court would have the last word—it would be the court of last resort on questions of law.

That the committee intended to lodge a great deal of power in this court is apparent in the discourse between Mr. Brooks and Mr. Rivers, which took place near the end of the house hearings.

MR. RIVERS: I think that tenure, if it should be decided for any term of years, should be staggered so as to always have a man on Judicial Council who knows about the make-up of the Court.

MR. BROOKS: I feel that way, too. I feel very strongly that the success or the failure of the whole thing is going to lie in the Judicial Council, and it seems to me you ought to have a strong court, whether you call it a Judicial Council or otherwise makes no difference; but it has been going through my mind that you ought to write in there some tenure. . . . Of course whether we put it in there or not, I am satisfied that the Senate is going to write it in there.

MR. RIVERS: Don't let us put it in. then. Let us have some reason for going to conference.

MR. BROOKS: Well, that might be a good reason. But it ought to be a **strong** court, because it is going to have *control of the whole system* and is going to make recommendations to the Congress from time to time; and, unless it is a strong court, your system is not going to be responsive to the recommendations. [emphasis added]<sup>42</sup>

The House committee clearly visualized a court of last resort that would have control of the entire system of military law. The final report of the committee to the House that accompanied the bill bore out this conclusion.<sup>43</sup> The House felt required to change the name of the Judicial Council to the Court of Military Appeals in keeping with its high function.<sup>44</sup>

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<sup>41</sup> *Hearings on H. K. 2498*, *supra* note 16, at 609.

<sup>42</sup> See *Hearings on H. R. 2498*, *supra* note 16, at 1271

<sup>43</sup> H. R. REP. NO. 491, *supra* note 29, at 6-7.

<sup>44</sup> See *ibid.*

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The Senate committee hearings and, further, the report of Senate committee support the conclusions of the House committee.<sup>45</sup> However, it should be noted that the Senate committee did receive a letter report from Senator Pat McCarran as Chairman of the Senate Judiciary Committee, in which he says he has made an intensive study of the bill <sup>46</sup> before the Senate committee and he concludes: "That this proposed Judicial Council is merely another administrative agency, as indicated earlier, rather than a 'military supreme court'. . ." <sup>47</sup> The Senate report shows, however, that his view was not accepted. That report stated, referring to the Court of Military Appeals:

"This court, composed of three civilians, appointed by the President and confirmed by and with the advice and consent of the Senate, will be the supreme authority on the law and assure uniform interpretation of substantive and procedural law."<sup>48</sup>

Both the House report and the Senate report stated clearly that the Court was within the Department of Defense, "for the purpose of administration only."<sup>49</sup> The degree of agreement between the two committees on the duties and function of the Court is indicated in the fact that although the Conference Report in referring to the Court of Military Appeals had to settle the question on tenure, salary and retirement for the judges, there was no further mention of the status of the court.<sup>50</sup>

It is not only important to note what Congress said about the Court when it created it, but also, it may be even more important to note what Congress didn't do or say in the face of the Court's interpretation of its function and authority and indeed, the claimed abuse of power of the court. What then has the Court said of its power and position?

### B. THE COURT'S NOTION

In *United States v. Armbruster* <sup>51</sup> the Court said of itself,

This court was created by Congress to sit in review of courts-martial on matters of law. In essence, it is the Supreme Court of the military justice system. Our decisions are binding upon the military.

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<sup>45</sup> See *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. (1949); S. REP. NO. 486, 81st Cong., 1st Sess. (1949).

<sup>46</sup> S. 857, 81st Cong., 1st Sess. (1949).

<sup>47</sup> *Hearings on S. 857*, *supra* note 45, at 102.

<sup>48</sup> S. REP. NO. 486, *supra* note 45, at 6.

<sup>49</sup> S. REP. NO. 486, *supra* note 45, at 28; H.R. REP. NO. 491, *supra* note 30, at 7.

<sup>50</sup> See H.R. REP. NO. 1946, *Conference Rep. on H.R. 4080*, 81st Cong., 2d Sess. (1950).

<sup>51</sup> 11 USCMA 596, 29 CMR 412 (1960).

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And, subject only to review by the Supreme Court of the United States on constitutional issues, our decisions are binding upon all departments, courts agencies, and officers of the United States. . . . Unless Congress changes the law, our decisions, like those of the Supreme Court of the United States, set out the governing principles.<sup>52</sup>

It should be noted that the Court in calling itself the "Supreme Court of the military justice system" used capital letters to refer to itself and then said clearly that its decisions were like the decisions of the Supreme Court of the United States in its area. For our purposes the court sees itself as possessing the maximum power given to any court in the United States.

The concept of the power of the Court expressed in *Armbruster*<sup>53</sup> was built up gradually over the life of the Court. In the early decisions the Court used the tool of general prejudice to gain compliance with its edicts. However, it should be noted that Judge Brosman and Chief Judge Quinn joined in the decisions that found general prejudice and Judge Latimer dissented.<sup>54</sup> The majority clearly recognized that the use of the doctrine of general prejudice was as a supervisory tool to effect compliance with its decisions. In *United States v. Allbee*<sup>55</sup> Judge Brosman speaking for the majority says.

The majority's view that, with the passage of time and the attainment of greater administrative maturity, it might become unnecessary to apply the legal notion of general prejudice . . . was criticized as being both logically inconsistent and unknown to the law. . . . The majority of the court recognized, of course, that its action was not one of usual occurrence in judicial opinions—despite its want of real novelty. Nonetheless—and with a due recognition of the massive proportions of the change effected by the Uniform Code . . . we felt compelled to adopt a drastic, if temporary, measure to insure immediate compliance with the clear and unambiguous Congressional mandate. . . .<sup>56</sup>

In this statement the critical member referred to was Judge Latimer, but while at the time of the *Woods*<sup>57</sup> case, Judge Latimer felt required to dissent vocally, in the *Allbee*<sup>58</sup> case he merely concurred in the result. It is important to note, too, that his reason for dissenting was not a lack of power on the part of the court but rather that the position taken was illogical and inconsistent and would fail to provide adequate

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<sup>52</sup> *Id.* at 598, 29 CMR at 414.

<sup>53</sup> *United States v. Armbruster*, 11 USCMA 596, 29 CMR 412 (1960).

<sup>54</sup> See, e.g., *United States v. Woods*, 2 USCMA 203, 8 CMR 3 (1953).

<sup>55</sup> 5 USCMA 448, 18 CMR 72 (1955).

<sup>56</sup> *Id.* at 451, 18 CMR at 75.

<sup>57</sup> *United States v. Woods*, 2 USCMA 203, 8 CMR 3 (1953).

<sup>58</sup> *United States v. Allbee*, 5 USCMA 448, 18 CMR 72 (1955).

guidance to the lower tribunals that must follow the mandates of the United States Court of Military Appeals.<sup>59</sup>

As a source of the Court's official expressions to Congress concerning its power and authority no more fertile source can be found than its annual reports required by the Uniform Code.<sup>60</sup> In the 1954 Annual Report<sup>61</sup> the judges for the first time appear to express fundamental disagreement with some proposals for code changes advanced by the military members of the Code committee<sup>62</sup> and say that the reason that they do not join in recommending the changes is because "the need for them has not been demonstrated or they turn back the wheel of progress . . ." <sup>63</sup> In the 1958 report the judges actively defend their position and the position of their court, saying,

The Judges have earnestly endeavored to make the United States Court of Military Appeals a *Court* in every sense of the word. In addition they have tried to discharge their obligations with fairness, firmness, justice, impartiality and judicial dignity."

The language is repeated verbatim in the 1959 report.<sup>65</sup> But, it remains for the 1960 report<sup>66</sup> for the Court to **ask** for life tenure for its judges. Apparently the final wedge was driven by the report of the Powell Committee,<sup>67</sup> which was incorporated into the annual report of the Judge Advocate General of the Army.<sup>68</sup> In referring to the joint reports issued by the Court and the Judge Advocates General, the Court referred to the seventeen recommendations in the Second Annual Report,<sup>69</sup> noting that areas of agreement had been reported to Congress each year since 1953,<sup>70</sup> but now doubt was thrown on the amount of agreement reached,

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<sup>59</sup> See *United States v. Wood*, 2 USCMA 203, 214, 8 CMR 3, 14 (1953) (Latimer, J., dissenting),

<sup>60</sup> UCMJ, Art. 67(g).

<sup>61</sup> The Annual Report of the Court of Military Appeals and the Judge Advocate General to the Committee on Armed Services of the Senate and of the House of Representatives (1954) [hereinafter referred to as the *Annual Report*].

<sup>62</sup> The code committee prescribed by Article 67 of the Uniform Code consists of the three judges of the Court of Military Appeals and the Judge Advocates General of the Army, Air Force and Navy. The Coast Guard is represented by the General Counsel, Department of the Treasury. The report contains a joint report by the entire committee and sectional reports by the Court and each of the services.

<sup>63</sup> *Annual Report* (1954) at 14.

<sup>64</sup> *Annual Report* (1958) at 36.

<sup>65</sup> *Annual Report* (1959) at 35-36.

<sup>66</sup> *Annual Report* (1960) at 11.

<sup>67</sup> *Powell Report supra* note 6.

<sup>68</sup> *Annual Report* (1960).

<sup>69</sup> *Annual Report* (1953) at 4-10.

<sup>70</sup> *Annual Report* (1960) at 4.

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Considerable doubt about the extent of unanimity heretofore reached has been created by the approval of the Secretary of the Army under date of October 11, 1960, of the Report of a Committee appointed to study operation under the Code.

This Court is appalled by the proposals therein contained . . . Our experience gained through the review of approximately 15,000 records of trial by courts-martial and our consultations with countless commanders in the field, fail to support in the slightest degree the main thrust of the Army position.<sup>71</sup>

Finally, in the 1960 report the Court recommended life tenure for its judges. In 1961 the theme was continued; the Court referred to itself in the 10 Year Chronology published in the 1961 Report as the "supreme court of the military composed entirely of civilians."<sup>72</sup>

Thus, the Court has made its bid for life tenure, it has declared its freedom of the military and the executive, and even the Supreme Court of the United States, except for habeas corpus review and then only on constitutional questions. As far as the Court of Military Appeals is concerned, it is truly a Supreme Court of the Military and unfettered in its approach to the interpretation of military law.

The Powell Committee Report<sup>73</sup> which seemed to touch off the Court's first full scale defense of itself included a number of recommendations to Congress. A few of them were adopted. Significant adoptions include the increased Article 15<sup>74</sup> powers of unit commanders and the bad check statute, Article 123a.<sup>75</sup> Significant recommendations not adopted are the requirements that would limit the authority of the Court or expand its membership to include two former military men as judges. The Powell Committee also recommended that "Article 59 be amended to define material prejudice to the substantial rights of an accused."<sup>76</sup> The evil to be corrected was that some cases are reversed for errors that do not materially prejudice an accused. This would appear to be a direct attack on the use of general prejudice as a supervisory tool by the Court. The recommendation to add judges to the Court that have had a recent military background<sup>77</sup> is a patent approach to secure more favorable treatment for the accepted service positions that the Court in the past had disregarded.<sup>78</sup> Congress has not acted on these proposals, while it has acted on the others noted above.

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<sup>71</sup> *Ibid.*

"*Annual Report* (1961) at 61.

"*Powell Report* *supra* note 6.

<sup>74</sup> UCMJ, Art. 15.

<sup>75</sup> CCMJ, Art. 123(a).

<sup>76</sup> *Annual Report* (1960) at 9.

"*Annual Report* (1960) at 9.

<sup>78</sup> *Annual Report* (1960) at 7.

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## C. CONGRESSIONAL APPROVAL

The House of Representatives on the 9th of July, 1963 passed a bill giving life tenure to the next judges to be appointed to the Court of Military Appeals.<sup>79</sup> The bill provides that the present judges could be reappointed for the life terms on the expiration of their present terms. The debate on the House floor gave the clear impression that the present membership of the Court would receive the life terms. The speakers during the debate were lavish in their praise of the Court and its members. The decisions of the Court were referred to as "classics of military legal jurisprudence,"<sup>80</sup> This action by the House can only be interpreted as a thumping endorsement of the Court's broad interpretation of its congressional mandate. Thus, even though the previously quoted legislative history may indicate something less than a "Supreme Court of Military Law," an assumption this writer does not accept, the present extent of the power of the Court is certainly worthy of that appellation, which has been approved by the House by direct action on the life tenure bill, and indeed by the inaction of the entire Congress. The power of the Court seems almost fully consolidated, and if the Congress acts favorably on the life tenure bill, it will be a *fait accompli*.

Therefore, it would seem that the Court can seek its sources of law where it will without any interference from the Executive or any court. It becomes necessary then to determine the possible sources of law available to the United States Court of Military Appeals.<sup>81</sup>

## IV. SOURCES OF LAW AVAILABLE TO THE COURT

In trying to determine the sources of law available to the Court consideration must be given to the nature and sources of law possible. A great deal of legal literature has been written in the attempt to distinguish law from its sources. Perhaps the most renowned exponent of the need to distinguish law from its sources was John Chipman Gray.

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<sup>79</sup> The bill (H.R. 3179) was passed by the House without committee hearings by use of the resolution resolving the House into a Committee of the Whole House on the State of the Union for consideration of the bill. The bill was accompanied by a brief report of the House Armed Services Committee which approved the bill unanimously. H.R. REP. No. 413, 88th Cong., 1st Sess. (1963). The bill passed the House by a heavy margin (314 to 82, 37 not voting). The main provisions of the bill provide that the judges next appointed to the United States Court of Military Appeals be appointed for life and that the Court be created as an Article I court. 109 CONG. REC. 11632-11642 (daily ed. July 9, 1963).

<sup>80</sup> 109 CONG. REC. 11637 (daily ed. July 9, 1963).

<sup>81</sup> The Court may, however, apply self restraint in the use of its powers. The Court has refused on two separate occasions to grant extraordinary writs, such as *certiorari* or *coram nobis*. The cases were disposed on the merits, the Court appears to have used judicious restraint. Cf. *United States v. John Taylor*, 12 USCMA 427, 31 CMR 13 (1961) and *United States v. Buck*, 9 USCMA 290, 26 CMR 70 (1958).

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His writings today represent the classic catalogue of the sources of law.<sup>82</sup> He divided the sources of law into five categories—statutes, judicial precedents, opinions of experts, customs, and principles of morality. He used morality in the broadest sense to include public policy.<sup>83</sup>

In the broad category covered by judicial precedents a later writer<sup>84</sup> has sought to distinguish between cases decided within the jurisdiction within which the court sits and those decided by other courts having similar systems of law. Each of these types of cases are presented as more weighty precedents than those decided by courts neither within the jurisdiction nor having similar systems of law. It is submitted that this classification regarding similar jurisdictions, called cognate jurisdiction—is uniquely inapplicable to the United States Court of Military Appeals. For this court works entirely from the framework of a code and is not supervised by any other common law court in the land. Another source added to Gray's catalogue by Dr. Patterson is the source he calls "societal facts."<sup>85</sup> This source does seem to have validity for the military. In fact, one of the societal facts that seems to have caused many of the decisions that were objected to in the Powell Committee Report<sup>87</sup> is the court's conviction that the military authorities are attempting to restore evils that the Uniform Code sought to correct.<sup>88</sup> Thus, the court feels constrained to keep a close watch for developments of this nature<sup>89</sup> and may indeed see developments where in fact none exist. Perhaps the court is aware of this when it says not only must evil be avoided, but even the appearance of evil must be avoided. Thus, the possible sources of law, using the classic catalogue and updating it with the ideas of current legal philosophers, includes statutes, judicial precedents, opinions of experts, customs, principles of morality and societal facts.

The sources of military law have attracted a few articles;<sup>90</sup> however, these articles have been confined to what I will call for lack of a better

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<sup>82</sup> See GRAY, *THE NATURE AND SOURCES OF THE LAW* (1st ed. 1909)

<sup>83</sup> See *id.* §§ 273, 274.

<sup>84</sup> Dr. Edwin W. Patterson, Cardozo Professor of Jurisprudence, Columbia University.

<sup>85</sup> PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 212-217 (1953).

<sup>86</sup> *Id.* at 240-243.

<sup>87</sup> *Powell Report supra* note 6.

<sup>88</sup> *Annual Report* (1960) at 4.

<sup>89</sup> *Annual Report* (1960) at 10.

<sup>90</sup> See Dahl, *Finding the Law of Naval Justice*, 14 *JAG JOURNAL* 67 (1960); Hartnett, *Survey Extended—The Literature of Military Law Since 1962*, 12 *VAND. L. RW.* 369 (1959); Mott, Hartnett & Morton, *A Survey of the Literature of Military Law—A Selective Bibliography*, 6 *VAND. L. REV.* 333 (1953).

title “purely military” sources of law. These sources are excellent (and contemporarily) catalogued in an article by the Chief Librarian of the Judge Advocate General of Navy.<sup>91</sup> The author groups the source material into three functional groups:

(1) Primary Sources—In this group he includes the cases of the Court of Military Appeals, and the various boards of review. He includes the Uniform Code of Military Justice and implementing regulations of the service secretaries.

(2) Secondary Sources—This group includes the digests, treatises on military law and articles published dealing with military law.

(3) Index Booke—This final division includes the books used to locate the items in the other two sources or to a limited extent explain their contents, *e.g.*, dictionaries, bibliographies and the like.<sup>92</sup>

In this catalogue, what is obviously missing are the sources that relate to the non-authoritarian law, *i.e.*, those sources that can't be labeled truly primary and including considerably more than is placed in the secondary sources, namely the cases of other courts, customs, principles of morality, societal facts and indeed, those treatises that don't deal with military law by name.

Admittedly the sources mentioned immediately above are not the kind of sources ordinarily cited in lower tribunals, indeed, even when cited they probably carry very little weight to a judge who is primarily concerned with following the law as decided by his appellate courts. However, the Court of Military Appeals as we have seen functions as a court of last resort and must choose from competing rules that may be deduced from the same codal provisions. The wisdom of adopting a particular rule is not based on past decisions but on the ability of the rule to serve the system and in this case to give life to the intent of Congress. Therefore, the article mentioned above only takes us to the threshold of the sources used by the United States Court of Military Appeals. It is the sources on the other side of the threshold that this writer seeks to isolate and examine.

Since the court must work essentially with a codal or statutory system, it is to be expected that attention will and should be paid to the sources of the legislation and the intent of the legislature as to the method of interpreting its statute. Since this article is concerned with the interpretation of the civil type crimes in the punitive articles, the sources for those particular articles will be presented.

There appears to be a general opinion that the definitions of the crimes follow the federal criminal law. However, the House of Repre-

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<sup>91</sup> Richard C. Dahl, **Esq.**, the author of the Article cited in note 90, *supra*.

<sup>92</sup> Dahl, *supra* note 90.

senatives and the Senate agree in their reports on the punitive articles of the Uniform Code that "most of the civil types of crimes are not defined in existing military law and there are some differences in the crimes which are defined."<sup>93</sup> It notes that the civil type crimes that are defined in the Articles of War, are based on the common-law definition of the *State of Maryland*. The Naval Courts and Boards, which defines crimes, however, has generally followed the Federal statutory definitions. The reports then state, that all of these differences have been reconciled in the punitive articles in the code.<sup>94</sup>

The Morgan Committee in reconciling all these differences apparently went to sources seeking to build the best code possible, in a kind of "cradle to the grave approach."<sup>95</sup> The variety of the sources used by the Morgan Committee is made apparent by perusal of the Legal and Legislative Basis of the Manual for Courts-martial.<sup>96</sup> In working out the definition of murder Alabama and Federal cases are cited.<sup>97</sup> In dropping the common law "year and a day rule" the article recognizes the increased ability of medical science to determine the cause of death.<sup>98</sup> In reference to larceny the conferees note that it is defined so as to closely follow section 1290 of the *New York Penal Law*.<sup>99</sup> Robbery appears to conform to New York Law also.<sup>100</sup> In defining forgery the definition is adopted verbatim from the 1949 Manual.<sup>101</sup> This minimum listing is enough to verify the variety of sources used to draft this Uniform Code. Congress approved the use of the varied sources to draft the best possible code and to reconcile differences existing the current definitions used by the services. The Court of Military Appeals

<sup>93</sup> H.R. REP. NO. 491, 81st Cong., 1st Sess. 35 (1949); S. REP. SO. 486, 81st Cong., 1st Sess. 32 (1949).

<sup>94</sup> *Ibid.*

<sup>95</sup> Mr. Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense, testified, during hearings on the Uniform Code, as follows:

"Se we started from scratch and ne examined each offense and tried to stick as closely as we could to the definition that was commonly used by both services and also to adopt whatever ideas we felt were worthwhile from some of the more modern State codes. We considered adopting the Federal definitions as defined in the Federal Code, but, unfortunately, we found there were some offenses that were not defined there, either.

"So we looked to all these sources and relied on most of them and tried to select what we thought was the clearest definition for each of those offenses . . ."  
*Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 1238 (1949).*

<sup>96</sup> Legal and Legislative Basis. Manual for Courts-Martial 1951.

<sup>97</sup> *Id.* at 268-270.

<sup>98</sup> *Id.* at 269.

<sup>99</sup> *Id.* at 273.

<sup>100</sup> *Id.* at 277.

<sup>101</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1949, para. 180 j.

was charged with the duty to provide uniformity among the services and they recognized this duty.<sup>102</sup>

In a Navy case<sup>103</sup> concerning the offense of negligent homicide, the court noted the fact that the Navy had not in the past, that is, before the Uniform Code, punished negligent homicide as a service discrediting disorder under the general article. The court noted further that the Army and Air Force had done so. The legislative history and the wording of the present general article is not clearly adoptive of either the Navy rule or the Army rule. In fact, the commentary says that the present article is adopted from both the Army and Navy articles.<sup>104</sup> The court noted that it was its duty to reconcile the practice in the services and seeing no way to fit the offense into the other homicide articles,<sup>105</sup> it simply adopted the Army rule. The court cited Winthrop and referred to his definition of conduct that was “prejudicial to good order and military discipline.”<sup>106</sup>

Thus, the code that was drafted with a view to any sources that would produce the best rule for the particular article, would be interpreted by the court of last resort, with reference to any sources of law that produced the best interpretation, even old sources, even military sources. It seems then that the whole catalogue of sources of law is available to the Court of Military Appeals. The key question that remains, however, is how has the court selected and used this veritable panoply of sources?

## V. SOURCES OF LAW USED BY THE COURT

In order that something more than the most topical treatment can be given to what the court has done in the definition of substantive offenses, something less than the entire scope of the punitive articles must be presented.<sup>107</sup> It seems that the use and development of a “common law of crimes” will be best evaluated in reference to that body of crimes usually referred to as common law crimes. These are the offenses of a civil nature, as opposed to military, and punishable in the criminal courts of most states. They fall into the four broad categories mentioned in the introduction, *viz.*, homicides, sex crimes, crimes against

<sup>102</sup> See *United States v. Kirchner*, 1 USCMA 477, 4 CMR 69 (1952).

<sup>103</sup> *United States v. Kirchner*, *supra* note 102.

<sup>104</sup> H. R. REP. NO. 491, *supra* note 93, at 35; S. REP. NO. 486, *supra* note 93, at 32.

<sup>105</sup> UCMJ, Arts. 118, 119

<sup>106</sup> WINTHROP, *MILITARY LAW AND PRECEDENTS* 722, 723 (2d. ed. rev. 1921).

<sup>107</sup> The punitive articles set out in the code not only cover all the military offenses and civil offenses, but also include, in the general grouping comprising articles 77 to 134, the definitions of principals, accessories and articles concerning attempts and solicitation.

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property and crimes against the person. These are the areas that will be covered in examining the sources used by the Court of Military Appeals to develop the meaning of the offense. Even though this article completely ignores the military offenses, it should be noted that attention is given to them in other works. The area covered by the general articles<sup>108</sup> has also been treated by other authors and it is felt should be the subject of a separate article. Thus, no coverage will be attempted of the purely military offenses, or those covered by the general article.

In its work of interpreting the Uniform Code, the Court of Military Appeals has never seemed to feel bound by the accepted maxims of statutory construction, although for the most part their work is merely to construe a single code.<sup>109</sup> However, this should not be credited totally to the debit side of the ledger. This kind of technique will surely avoid the ridiculous interpretation given the White Slave Act<sup>110</sup> by a court bent on using the "plain meaning" rule of statutory construction.<sup>111</sup> The Court has taken the task of interpreting the Code in the broadest sense and relied on its ability to effect the general intent of Congress to create a fair and disciplined system of justice for the military. The court has assumed a role of preeminence in guiding the system to the accomplishment of this objective.

The *Uniform Code of Military Justice* differed greatly from the Articles of War or the Articles for the Government of the Navy in that most of the civil offenses are rather fully defined in the Code.<sup>112</sup> And in

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<sup>108</sup> UCMJ, Arts. 133, 134.

<sup>109</sup> "This is not to say that the Court possesses any exclusive rule making power, but rather the Court has the duty of interpreting the substantive offenses set forth in the code. This duty is not changed in any degree because a crime is defined in the *Manual for Courts-Martial*. The Court has consistently said that its authority to interpret the substantive crimes is free of the manual, whereas a different approach, at least as to rationale, has been taken regarding procedural rules. This is a result of the power vested in the President by Article 36 of the Uniform Code. See *United States v. Villasenor*, 6 USCMA 3, 7, 19 CMR 129, 133 (1955) (rules of evidence).

<sup>110</sup> 18 U.S.C. § 2421 (1958).

<sup>111</sup> In *Cleveland v. United States*, 329 U.S. 29 (1946), the Supreme Court, in applying an act to prevent the "white slave" traffic, convicted a Mormon of interstate transportation of a woman for an immoral purpose when he took his plural wife from one of his homes to the other. His farm was situated on both sides of the border between Arizona and Utah. One of his wives was confined in the hospital and he took the other to care for the children in the other home. The use of "plain meaning" here, produced a result that seems far beyond the intent of Congress.

<sup>112</sup> Ree, *The Uniform Code of Military Justice*, 25 ST. JOHN'S L. REV. 155 (1951).

"The Articles of War had been deficient in that they did not define most of the important military and civil offenses. . . . The Code now contains a well drawn penal code that defines not merely the military offenses but also most of the civil types of crimes." *Id.* at 182-183.

some cases the legislative history was clear enough to indicate the express intent of Congress regarding a specific crime.<sup>113</sup> But, an examination of the case setting out the essential elements of the various civil crimes will show the extent to which the Court of Military Appeals has created a "common law of crimes" and the sources it has used in this creation.

### A. DEFINING HOMICIDE

A perusal of the articles of the Uniform Code dealing with homicide<sup>114</sup> discloses six classes of homicides as follows:

- (1) Premeditated murder
- (2) Unpremeditated murder
- (3) Felony-murder
- (4) Voluntary manslaughter
- (5) Involuntary manslaughter
- (6) Misdemeanor-manslaughter<sup>115</sup>

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<sup>113</sup> "A reading of the punitive articles will show that the improvement effected by the Code consists of leaving no doubt as to what it deemed punishable conduct." *Id.* at 183. Perhaps in this case the author gave the Congress too much credit. While the definitions were indeed a great improvement, there was still some work to be done on the scope of the substantive offenses as the later work of the Court of Military Appeals indicated.

<sup>114</sup> "Article 118 Murder

"Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

- (1) has a premeditated design to kill;
- (2) intends to kill or inflict great bodily harm;
- (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
- (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct."

"Article 119 Manslaughter

"(a) Any person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.

"(b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—

- (1) by culpable negligence; or
- (2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person;

is guilty of involuntary manslaughter and shall be punished as a court-martial may direct.']

<sup>115</sup> Negligent homicide is also punishable under the code but since it is proscribed under the general article, see note 104, *supra*, it is not treated in this study.

The Court of Military Appeals has used a variety of sources in spelling out the distinctions between these types of homicide and the necessary elements of each. Because of the nature of the offense involved, the Court most often is forced to consider the applicability of more than one type of homicide and a case discussing a single type of homicide almost never occurs.

In *United States v. Bartholomew*<sup>116</sup> the court was faced with the problem of distinguishing between murder and manslaughter. The court cited an English authority<sup>117</sup> for the proposition that homicide was a generic offense at common law, and that in most American jurisdictions the distinguishing fact was malice aforethought. But, the court went on to say that manslaughter was not a kind of residual offense, so that if malice wasn't present, a killing which would otherwise be murder would be properly manslaughter. In arriving at this notion the court looked at various United States jurisdictions and found only one, Kentucky, treated manslaughter as a residual category of homicide. The court then cited two well known treatises on criminal law<sup>118</sup> to support their position, *i.e.*, that manslaughter was not a residual category, and therefore, the added element that the killing occurred in the "heat of passion" was essential to a finding of manslaughter.

In this case appellate defense counsel contended that the absence of facts pointing to a "heat of passion" killing rendered a finding of guilty of manslaughter erroneous as a matter of law. The court agreed using the technique referred to above, but disposed of the case by noting that if the evidence supported a finding of murder rather than manslaughter, nevertheless, the accused was not harmed by a finding of a lesser offense. In order to support this rule and this disposition of the case the court cited no less than nine jurisdictions, *viz.*, Alabama, Arizona, California, Florida, Mississippi, New Mexico, Pennsylvania and Texas.<sup>119</sup> Thus, a troublesome case was disposed of but the technique of the court is more interesting than the law developed. Here the court made no attempt to seek the legislative history of the pertinent articles, but rather a wide range of authorities were examined and the rule selected was what the court conceived of as the majority rule.

<sup>116</sup> 1 USCMA 307, 3 CMR 41 (1952).

<sup>117</sup> See *id.* at 312, 3 CMR at 46, where the court cites ODGERS, *THE COMMON LAW OF ENGLAND*, 257 (3d ed. 1927).

<sup>118</sup> CLARK & MARSHALL, *A TREATISE ON THE LAW OF CRIMES* (4th ed. 1940); MILLER, *HANDBOOK OF CRIMINAL LAW* (1934).

<sup>119</sup> See *United States v. Bartholomew*, 1 USCMA 307, 3 CMR 41 (1952).

In *United States v. Roman*<sup>120</sup> the court had occasion to compare premeditated and unpremeditated murder. It likens the former to the civilian crime of first degree murder and the latter to murder in the second degree. The court then went on to point out that the difference between the two is the kind of intent required. The specific problem that the court was wrestling with was whether drunkenness reduced unpremeditated murder to manslaughter, because of inability to form the requisite intent. In this problem of first impression, the court first went to Winthrop's venerable treatise on military law. Winthrop implied that such a reduction should occur.<sup>121</sup> The court then examined the pertinent holdings of the Court of Appeals of the District of Columbia and the Supreme Court of Arkansas. These cases stated conclusions contrary to Winthrop. Indicating that its attention had been called to cases contrary to the District of Columbia and Arkansas rule, specifically mentioning a case from the Supreme Court of Idaho, the court nevertheless adopted the rule it termed the "better rule." In adopting the District of Columbia and Arkansas rule the court gave no other reason except that it was the better rule. Here there does not seem to be a clear attempt to arrive at a majority rule.

The *Roman*<sup>122</sup> case was not really concerned with the interpretation of the Uniform Code because the charges were laid under the old Articles of War, but in a subsequent case<sup>123</sup> involving Article 118<sup>124</sup> the same rule as regards drunkenness was applied. The authority techniques were about the same. When the Court again had drunkenness raised as a defense in *United States v. Stokes*<sup>125</sup> it concerned subparagraph 3 of Article 118.<sup>126</sup> The majority seemed to wonder if perhaps a different rule should apply and maybe drunkenness should negative intent. But, the court speaking through Judge Brosman said they were bound by their construction in *Craig*.<sup>127</sup> This rationale caused Judge Latimer to dissent in order to state that there was no need to feel bound by *Craig*,<sup>128</sup> as the reason for the result. He felt that it would be

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<sup>120</sup> 1 USCMA 244, 2 CMR 150 (1952).

<sup>121</sup> See WINTHROP, *op. cit. supra* note 106, at 292-293.

<sup>122</sup> *United States v. Roman*, 1 CSCMA 244, 2 CMR 150 (1952).

<sup>123</sup> *United States v. Craig*, 2 USCMA 650, 10 CMR 148 (1953).

<sup>124</sup> *Supra* note 114.

<sup>125</sup> 6 USCMA 65, 19 CMR 191 (1955).

<sup>126</sup> *Supra* note 114.

<sup>127</sup> *United States v. Craig*, 2 USCMA 650, 10 CMR 148 (1953). It is interesting to note that the Court said that it was bound by its previous construction. The Court haetened to point out, however that the Manual construction was in no way binding.

<sup>128</sup> *United States v. Craig*, *supra* note 127.

anomalous to hold that drunkenness would negate malice when it was directed toward a group but that it could not if the malice was directed toward an individual. He determined that since the malice was directed toward a larger number of people, in the instance of an offense against Article 118 (3),<sup>129</sup> there was a greater danger to society and a *fortiori*, a need to apply at least, as stringent a rule, as was applied in the *Craig*<sup>130</sup> case. However, it seemed that the majority was trying to decide if a different level of intent was spelled out in the two subparagraphs. For our purposes the remarkable thing is the feeling of the majority that it was bound by its past decision.<sup>131</sup>

In a case dealing with the application of the rule of transferred intent in homicide cases<sup>132</sup> the court, says that the general rule is enunciated in a treatise on homicide.<sup>133</sup> The majority indicates that there is no doubt that they would follow this rule. The dissent does not dissent from this view. However, the majority finds a sufficient amount of evidence to uphold premeditated murder independent of the transferred intent theory. It appears that the court just wanted to be heard on the problem of transferred intent and without hesitation the court approved the majority rule selected from a single treatise.

The Uniform Code makes no provision for affirmative defenses and these have been almost totally creatures of the court. However, Article 118 does mention "justification or excuse" and in working out the excuse of insanity, the court took a long look at the various legal definitions of insanity in *United States v. Kunak*.<sup>134</sup> In that case the court examined the *Durham*<sup>135</sup> rule and rejected it in favor of the Manual rule saying, "We need only say that, under the present conditions, we are not disposed to disagree with the tests he [the President] prescribes."<sup>136</sup> The court calls the *Durham*<sup>137</sup> rule a revolutionary change and indicates as the chief reason for not adopting it the possibility of placing unforeseen burdens on the services and causing administrative

<sup>129</sup> *Supra* note 114.

<sup>130</sup> *United States v. Craig*, 2 USCMA 650, 10 CMR 148 (1953).

<sup>131</sup> Paradoxically, it was Judge Latimer who dissented in *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960), when the majority overturned an existing rule concerning depositions. He said that once an article of the Code had been interpreted and the services had operated under that construction any change should come from the Congress. *United States v. Jacoby*, *supra* at 434, 29 CMR at 250.

<sup>132</sup> *United States v. Sechler*, 3 USCMA 363, 12 CMR 119 (1953).

<sup>133</sup> WARREN & BILAS, WARREN ON HOMICIDE (perm. ed. 1939).

<sup>134</sup> 5 USCMA 346, 17 CMR 346 (1954).

<sup>135</sup> For an excellent discussion of the rule see 30 CINC. L. REV. 524 (1963).

<sup>136</sup> *United States v. Kunak*. 5 USCMA 346, 356, 17 CMR 346, 356 (1954).

<sup>137</sup> See note 135. *supra*.

chaos. The court indicates that such changes should come from the Congress which can weigh all the effects and adjust the remainder of the system to cope with such revolutionary changes.

In a later case in the same area, *United States v. Smith*<sup>138</sup> the court cites *societal facts* peculiar to the military as valid reasons for continuing the present rule. The societal facts cited by the court are:

(1) The possible unavailability of sufficient military psychiatrists to properly evaluate each case and the great possibility of successfully faking insanity.

(2) The very strong motivation for faking insanity, since a finding of not guilty by reason of insanity doesn't necessarily result in commitment to a mental institution and the prize may be an easy way out of military duty that is onerous.

Thus, we see the court using the technique of citing special facts concerning the military to support their choice of a rule.

In *United States v. Waluski*,<sup>139</sup> the court was concerned with involuntary manslaughter resulting from the negligent operation of a misappropriated vehicle. The court considered the possibility of both felony-murder and misdemeanor-manslaughter, in that the pedestrian was killed during the negligent operation of vehicle being actively misappropriated. But, without citing authorities the court concluded that misappropriation was not one of the felonies included in the listing in the felony-murder article.<sup>140</sup> The court, again without citing authorities, concluded that misappropriation was not a misdemeanor directly "affecting the person"<sup>141</sup> and therefore this theory did not apply. After determining that culpable negligence in the operation of a vehicle causing death was involuntary manslaughter as to the driver, the court had occasion to consider the effect as to a passenger. In order to determine the liability of the passenger, not senior and in charge of the vehicle, the court looked to "ancient military custom." In the search the court examined old board of review cases from the European Theatre of Operations and found no "ancient military custom" placing any liability on a mere passenger. The court then held there was no criminal liability.

Thus, the court in carving out the meaning of the various kinds of homicides has sought support, from its past cases, treatises, cases of other jurisdictions, Manual provisions, societal facts and ancient military custom. The main thrust of the court's technique seems aimed at

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<sup>138</sup> 5 USCMA 314, 17 CMR 314 (1954).

<sup>139</sup> 6 USCMA 724, 21 CMR 46 (1956).

<sup>140</sup> *Supra* note 114.

<sup>141</sup> *Ibid.*

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adopting what it considers the "better rule." The court seems to favor a "counting of noses" as a way of determining what a majority of courts have thought is the better rule, and to rely on the accumulated experience of the other courts.

### B. DEFINING SEX CRIMES

In defining the two major sex crimes, rape<sup>142</sup> and sodomy,<sup>143</sup> the court seemed almost reluctant to consider the definition of the offenses in any detail. It was as if the court wanted to do the minimum necessary to effect review and get the business out of their hair.

#### 1. Rape.

In the early cases concerning rape,<sup>144</sup> the court was satisfied merely to approve the Manual definition given in the **1949 Manual for Courts-Martial**.<sup>145</sup> In the *Marshall*<sup>146</sup> case it was held that, absent a defense request, the law officer was under no obligation to amplify or explain the term "carnal knowledge." The court stated that "carnal knowledge" was not a technical term, citing as authority a case from the Fifth Circuit Court of Appeals and a case decided by the Supreme Court of Missouri.

In a **1954** case,<sup>147</sup> the court was construing the provision of the Uniform Code and proceeded in the same as in the *Parker* and *Marshall* cases.<sup>148</sup> The court held the definition given in the **1951 Manual for Courts-Martial** was adequate when presented against the backdrop of the evidence. No authorities were cited here. However, in the same case.

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<sup>142</sup> "Article 120 Rape

"(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct."

"(c) Penetration, however slight, is sufficient to complete either of these offenses." [(b) omitted]

<sup>143</sup> "Article 125 Sodomy

"(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

"(b) Any person found guilty of sodomy shall be punished as a court-martial may direct."

<sup>144</sup> See, e.g., *United States v. Parker*, 3 USCMA 272, 12 CMR 28 (1953); *United States v. Marshall*, 2 USCMA 54, 6 CMR 54 (1952).

<sup>145</sup> *Manual for Courts-Martial, United States, 1949*, para. 179b.

<sup>146</sup> *United States v. Marshall*, 2 USCMA 54, 6 CMR 54 (1952).

<sup>147</sup> *United States v. Henderson*, 1 USCMA 268, 15 CMR 268 (1954).

<sup>148</sup> *United States v. Parker*, 3 USCMA 272, 12 CMR 28 (1953); *United States v. Marshall*, 2 USCMA 54, 6 CMR 51 (1952).

in deciding to follow a general evidentiary rule concerning the victim's testimony as to rape<sup>149</sup> the court said,

The soundness of this rule is demonstrated by the fact that it has found favor in many more jurisdictions throughout the country than any competitive evidentiary principle in the field.<sup>150</sup>

In order to demonstrate the extent of the acceptance of the rule the court cites numerous cases from a total of sixteen jurisdictions.

In *United States v. Short*,<sup>151</sup> the court again approved the Manual definition. The court had occasion to mention an instruction to the effect that the only force needed to satisfy the requirement for the crime of rape was the necessary force to effect penetration. Because the case involved merely a finding of assault with intent to commit rape, the matter covered was dictum. However, the Court noted that the defect in the instruction was the failure to distinguish between the situation in which a woman is helpless and unable to resist and the situation of a woman in normal condition and in possession of her faculties. The Court concluded that the instruction, standing alone, was too broad. In expressing disapproval of such an instruction the Court cited a single Supreme Court case, *United States v. Mills*<sup>152</sup> which disapproved such an instruction and quoted part of the analysis of the Supreme Court. Nevertheless, generally, as regards the crime of rape, there has not been much search for authority by the court which has been generally content to accept the Manual definition.<sup>153</sup>

## 2. Sodomy.

Sodomy has received much the same sort of treatment. The court has not gone much beyond the name in defining this crime. In *United States v. Warren*,<sup>154</sup> in its apparent haste to dispose of the matter, the court seems to say that sodomy has only a single element, that is, unnatural penetration. In that case, the court said,

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<sup>149</sup> *I.e.*, that the uncorroborated testimony of the prosecutrix in a rape case will not support a conviction if it is self-contradictory, or incredible.

<sup>150</sup> *United States v. Henderson*, 4 USCMA 268, 271, 15 CMR 268, 271 (1954).

<sup>151</sup> 4 USCMA 437, 16 CMR 11 (1954).

<sup>152</sup> 164 U.S. 644 (1897).

<sup>153</sup> An unusual example of the freedom of the Court to select sources of law involved the adoption of a provision of the *Model Penal Code*. This code was not drafted till some time after the adoption of the *Cniform Code of Military Justice*, however, the Court used a provision of the Model Code to define the military law concerning attempts. Because the model provision resulted in a sweeping change of the existing common law the Court has been criticized for judicial legislation. The decision, however, remains the prevailing military rule. See *United States v. Thomas*, 13 USCMA 278, 285-86, 32 CMR 278, 285-86 (1963).

<sup>154</sup> 6 USCMA 419, 20 CMR 135 (1955)

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Sodomy belongs to a class of a case which excludes every possibility of an innocent intent. It cannot be committed through accident, misfortune or under an honest or ignorant mistake of fact. Inherent in its commission is the necessary *mens rea* to satisfy the requirements of criminal law. Once the act is proved, it becomes unnecessary for the Government to go further. . . .<sup>155</sup>

And, in a fashion very similar to the acceptance of the Manual definition of rape, the court in *United States v. Phillips*,<sup>156</sup> held that “unnatural carnal copulation” was adequate to state a definition of sodomy. No other explanation would be required unless some was requested by the defense.

In *United States v. Morgan*<sup>157</sup> the court was forced to consider the scope of sodomy in the case of an accused charged with assault with intent to commit sodomy, and the completed act of sodomy, arising out of the same transaction. The court held that under Article 125,<sup>158</sup> both consensual and non-consensual sodomy was proscribed. Therefore, the court said the assault with intent merged in the crime of completed non-consensual sodomy. Judge Latimer dissented and in a searching analysis he compared the two offenses and state statutes covering the same offenses. He noted that non-consensual sodomy was in some states a sort of first degree sodomy, while consensual sodomy was treated less severely. In examining the Table of Maximum Punishments, he noted that assault with intent to commit sodomy was punished much more severely than sodomy and concluded it was a separate and more serious offense and not merged in the completed act

Again, in *United States v. Sanchez*,<sup>159</sup> the Court refused an opportunity to produce a detailed analysis of the sodomy article. The accused was charged with a disorder under Article 134,<sup>160</sup> in that he committed an act of bestiality with a fowl. The Court noted and brushed aside the question as to whether this was “unnatural carnal copulation” within the meaning of Article 125.<sup>161</sup> A defense contention that there was no offense stated under Article 134, was summarily dealt with. The Court merely stated that the conduct was so disgusting that it was certainly service discrediting conduct.<sup>162</sup>

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<sup>155</sup> *Id.* at 424, 20 CMR at 140.

<sup>156</sup> 3 CSCM.4 137, 11 CMR 137 (1953).

<sup>157</sup> 8 USCMA 341, 24 CMR 151 (1957).

<sup>158</sup> *Supra* note 143.

<sup>159</sup> 11 USCMA 216, 29 CMR 32 (1960).

<sup>160</sup> *Supra* note 108.

<sup>161</sup> *Supra* note 143.

<sup>162</sup> *United States v. Sanchez*, 11 USCMA 216, 29 CMR 32.34 (1960).

Thus, it seems the Court will content itself with the most topical of definitions for the sex crimes and for the most part accept the Manual definitions. Detailed analysis and source searching, indeed compilation of supporting cases and treatises is just not attempted in this area.

### C. DEFINING CRIMES AGAINST PROPERTY

An examination of the Court's work in defining three of the crimes against property—burglary, arson and robbery<sup>163</sup> shows that the court seems to apply similar techniques to those noted in the work of defining homicides. However, as regards the offense of burglary the court seemed quite ready to break a new path, and liberally construe the penal statute when indecent assaults were involved.

#### 1. Burglary.

In *United States v. Kluttz*,<sup>164</sup> the court examined the case of man charged with burglary.<sup>165</sup> It was alleged that he entered the house with intent to commit rape. The general court-martial found him guilty of burglary with intent to commit indecent assault. The problem facing the Court of Military Appeals on review was that this was not one of the kinds of intent specified as constituting burglary in the Uniform Code.<sup>166</sup> The court said,

Burglary in the military law includes the elements of the common law crime except that the felony intended has been limited to those offenses specified in Articles 118 to 128 of the Uniform Code. . . . Indecent assault is not defined in any Article. . . . Syllogistic reasoning would seem to compel a conclusion that there is no crime in military law such as burglary with intent to commit indecent assault.<sup>167</sup>

The court decided, however, that there is such an offense, apparently unimpressed with syllogistic reasoning. The conclusion is reached by first observing that assault is a mentioned felony and that indecent assault includes a simple assault. The court concluded that the finding

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<sup>163</sup> While it is true that robbery is a crime against the person in that its seriousness is increased by the element of harm to the person as well as theft of the property, it is grouped here for convenience.

<sup>164</sup> 9 USCMA 20, 25 CMR 282 (1958).

<sup>165</sup> "Article 129 Burglary

"Any person subject to this chapter who, with intent to commit an offense punishable under . . . [Articles 118–128] breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct."

<sup>166</sup> The intent required must be that to commit the following offenses: murder, manslaughter, rape, carnal knowledge, larceny, wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion or assault. The nature of the list prescribed makes very applicable the maxim, *expressio unius exclusio alterius est*.

<sup>167</sup> *United States v. Klutta*, 9 USCMA 20, 22, 25 CMR 282, 284 (1958).

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was without error, as at worst it merely included a surplus element, namely the aggravating indecency. In reaching this conclusion the court did not cite any type of source authority, but merely reasoned to an intended result, albeit unsyllogistically.

A similar problem was raised in an earlier case, but there, rather than attempt to stretch the law as above, the court worked on the facts by way of presumption. In *United States v. Parker*,<sup>168</sup> the accused was charged with burglary with intent to commit larceny. The only act performed in the house after entry was an indecent assault. The court found, however, a number of cases in which state courts in similar situations and faced with similar statutes raised a presumption, that unless other reasons were offered for the breaking, larceny would be presumed. The court pointed out that the majority of entries are for larceny. A saving factor in this case was the fact that a confession stated a larcenous intent, but the corpus delicti rule required some proof of each of the elements. The majority reasoned that if the state courts could presume the intent to find evidence of the crime itself, they could certainly presume the intent to establish the corpus delicti. This is an example of the most tenuous use of authority that I have been able to discover.

### 2. Arson.

In defining arson, which was at common law, an offense against the habitation, the Court was again faced with the problem of distinguishing the arson covered by Article 126<sup>169</sup> and the burnings that could be charged under Article 134. *United States v. Fuller*<sup>170</sup> presented the case of an accused charged with burning with intent to defraud an insurer. The charge was laid under Article 134. In considering the criminality of a fraudulent burning the Court found that the law was unclear as to whether this was an offense at common law. The Court considered cases from Tennessee, New Jersey, and South Carolina. But, the Court noted

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<sup>168</sup> 6 USCMA 274. 19 CMR 400 (1955).

<sup>169</sup> "Article 126 Arson

"(a) Any person subject to this chapter who willfully and maliciously burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as court-martial may direct.

"(b) Any person subject to this chapter who willfully and maliciously burns or sets fire to the property of another, except as provided in subsection (a), is guilty of simple arson and shall be punished as a court-martial may direct."

<sup>170</sup> 9 USCMA 143. 25 CMR 405 (1958).

that in modern times it was made an offense in most jurisdictions by statute.<sup>171</sup>

The problem of preemption was thornier. However, the Court treated the problem in a way not unlike the *Sanchez*<sup>172</sup> case. The court found that the Congressional hearings show nothing significant in regard to Congressional intent as to preemption. Then, citing a single case from the Supreme Court of Ohio, the Court asserted that arson and burning with intent to defraud are separate and distinct crimes. The Court pointed out, furthermore, that the latter offense is not merely arson with an element dropped, and therefore is properly chargeable under Article 134.

### 3. Robbery.

The offense of robbery doesn't seem to have presented too many problem to the Court by way of definition. It is well defined in the Code.<sup>173</sup> In *United States v. Rios*,<sup>174</sup> the Court had a problem with a specification concerning robbery. The majority held a specification fatally defective that did not contain the element of a taking *in the presence of or from the person* of the victim. The majority saw this element as "the very touchstone of robbery's gravity." The dissenter agreed as to the essential nature of the element but thought that it was implied in the specification. The majority followed the standard technique of citing state cases in support, *viz.* Alabama, California, Mississippi and Oklahoma. Even *Corpus Juris Secundum* was cited.

In *United States v. Calhoun*,<sup>175</sup> the court came to a problem concerning the lesser included offenses present in robbery and defined robbery in terms of lesser included offenses citing no other authority than the common law. The Court stated that robbery was a compound offense,

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<sup>171</sup> The Court's citation of the statutes is designed to show that the conduct is considered criminal and therefore service discrediting; however, this doesn't add weight to the conclusion that the burning was not a crime at common law. The statutes may well be declarative of a common law, and at any rate they do not show the non-existence of a common law rule. See PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 217 (1953).

<sup>172</sup> *United States v. Sanchez*, 11 USCMA 216, 29 CMR 32 (1960). See notes 159-61 *supra* and text accompanying.

<sup>173</sup> "Article 122 Robbery

"Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct."

<sup>174</sup> 4 USCMA 203, 15 CMR 203 (1954).

<sup>175</sup> 5 USCMA 428, 18 CMR 52 (1955).

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consisting of a larceny and an assault. The crime of robbery results when the two offenses or larceny and assault are committed concurrently. Thus, the court said the single specification of robbery alleged two distinct lesser included offenses. In supporting its conclusion the court said :

Robbery both under modern statutes and common law, is a compound offense. . . . The foregoing propositions are so universally recognized that we need not cite authorities to support them. . . .<sup>176</sup>

### D. DEFINING CRIMES AGAINST PERSONS

The two crimes against persons that will be discussed are extortion and maiming. They are proscribed by Articles **127**<sup>177</sup> and **124**,<sup>178</sup> respectively. The definitions of both of these crimes have not been hammered out in very many cases but extortion has been the subject of constant dissent, with the persistent majority now broken up by the departure of Judge Latimer from the bench.

#### 1. Extortion,

In an early case concerning extortion<sup>179</sup> the court faced the problem of defining extortion and comparing it to communicating a threat as charged under Article **134**. The Court noted that at common law communicating a threat—a simple threat—was not an offense. However, the Court pointed to a single federal case in which a bond had been required of an individual who had made a threat of physical injury, the bond to be forfeited if the threat of physical injury was carried out. The Court cited Title **27**, Section **507** of the *District of Columbia Code* that provided for such a procedure. From this it deduced that the harm inherent in simple threat was recognized.<sup>180</sup> Therefore, the Court felt

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<sup>176</sup> *Id.* at **431**, **18 CMR** at **55**.

<sup>177</sup> “Article **127** Extortion

“Any person subject to this chapter who communicates threats to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and shall be punished as a court-martial may direct.”

<sup>178</sup> “Article **124** Maiming

“Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which

- (1) seriously disfigures his person by any mutilation thereof;
- (2) destroys or disables any member or organ of his body; or
- (3) seriously diminishes his physical vigor by the injury of any member or organ;

is guilty of maiming and shall be punished as a court-martial may direct.”

<sup>179</sup> *United States v. Holiday*, **4 USCMA 454**, **16 CMR 28** (1954).

<sup>180</sup> However, there was no punishment as such, and therefore the conduct under the tests discussed above was not criminal. The only “punishment” was the requirement that the bond be posted.

itself able to hold that simple threat was a separate offense from the offense covered by extortion, which the court noted required not only the threat but also the purpose of the threat to gain some advantage. Thus, the court carved simple threat out of extortion, as a service discrediting offense not preempted by Article 127.<sup>181</sup> Judge Brosman dissented and pointed to the number of specific punitive articles adopted that preempted any field available to the general article.<sup>182</sup> He would follow the *Norris*<sup>183</sup> rule and find the field clearly preempted.

In two 1960 cases<sup>184</sup> the court again dealt with the offense of extortion. Judge Quinn and Judge Latimer again constituted the majority, but a new dissenter took the place of Judge Brosman, Judge Ferguson.

In the *Frayer* case<sup>185</sup> the accused was charged under Article 134. He contended that Article 127<sup>186</sup> preempted the general article where a threat was made to secure a gain for himself. Speaking for the majority the Chief Judge said simply, "Our holding in that case provides sufficient reason to reject the argument here."<sup>187</sup> Joining in a concurring opinion Judge Latimer appeared to note the new element of intent to secure personal gain, but argued that Congress can make the same conduct punishable under more than one statute. Judge Latimer notes that the crime of simple threat is covered in the 1951 *Manual for Court-martial*, in both sample specifications and the Table of Maximum Punishments. He appears to take little comfort in this, however, as he says, "While these are merely straws in the wind, they are factors which bear on the question of preemption and suggest a new and unintended offense is not being created by our construction."<sup>188</sup> In his dissent Judge Ferguson looks to the hearing and legislative history of the articles for support.

In *United States v. Sulima*<sup>189</sup> the majority is faced with the same problem but merely ignores it. Judge Ferguson again registers his

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<sup>181</sup> *Supra* note 177.

<sup>182</sup> Judge Brosman pointed to the offenses proscribed by Articles 89, 91, 117, 127, and 128 of the Uniform Code.

<sup>183</sup> *United States v. Norris*, 2 USCMA 236, 8 CMR 36 (1954). The extent and projections expected on the use of this *Norris* rule are covered in an excellent article, Meagher, *The Fiction of Legislative Intent: A Rationale of Congressional Preemption in Court-Martial Offenses*, 9 MIL. L. REV. 69 (1960).

<sup>184</sup> *United States v. Frayer*, 11 USCMA 600, 29 CMR 416 (1960); *United States v. Watkins*, 11 USCMA 611, 29 CMR 427 (1960).

<sup>185</sup> *United States v. Frayer*, *supra* note 184.

<sup>186</sup> *Supra* note 177.

<sup>187</sup> *United States v. Frayer*, 11 USCMA 600, 604, 29 CMR 415, 420 (1960).

<sup>188</sup> *Id.* at 608, 29 CMR at 424.

<sup>189</sup> 11 USCMA 630, 29 CMR 446 (1960).

dissent, stating that this case is even stronger as the gain to be secured through the threat is money.

Aside from the preemption problem, though, the line of cases establish the elements of extortion fairly clearly and without the use of a great deal of authority. It appears that the offense as defined in the statute is accepted by the majority and the minority of the court. The preemption problem though may again be an open question since Judge Latimer has left the court.

### 2. Maiming.

In defining maiming the court had occasion to decide a case in which the principal issue was the precise construction of the article.<sup>190</sup> It is, therefore, an excellent study in the construction and authority techniques used by the court. Appellate defense counsel arguing that there must be intent to inflict serious or permanent injury to sustain the offense of maiming, pointed out that the article was "partially a verbatim adoption" of the Minnesota statute dealing with the crime. He then pointed out that the decisions of the Supreme Court of Minnesota construing the statute, and in effect at the time of adoption of the Uniform Code, had held the intent to inflict serious or permanent injury was an essential element of the crime. He then pointed to the well accepted rule of statutory construction called "implied adoption." The court's reply was simply that it was wholly free to ignore prior state court precedent in arriving at the intent of Congress and in support cited one of its recent cases.

In construing the article the court cited series of cases concerning the "plain meaning" rule of statutory construction and quoting from *Russell Motor Car Co. v. United States*<sup>191</sup> the Court said that when the statute is clear there is no need for aids of statutory construction to arrive at its plain meaning. The Court pointed out further that the draftsmen of the Code indicated that the criminal conduct proscribed was to be broader in scope than common law mayhem. Then, citing *Brown v. United States*<sup>192</sup> the Court found that common law mayhem did not require any intent to inflict specific injuries. Therefore, the reasoning continued, if a specific intent was required, it would make the crime more narrow in scope than common law mayhem and fly in the face of the intent of Congress.

Thus, with a full use of authority techniques, the court builds its definition of maiming, not to find the exact meaning of each **work**,

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<sup>190</sup> See *United States v. Hicks*, 6 USCMA 621, 20 CMR 337 (1956)

<sup>191</sup> 261 U.S. 514 (1923)

but to effectuate the broad intent of Congress when it enacted the article.

## VI. CONCLUSIONS

The sources of law used by the Court of Military Appeals are every bit as diverse as the sources used to draft the Uniform Code.<sup>193</sup> But, if a court is to interpret a code so constructed, shouldn't it interpret it with such sources? One limitation that would prevent the court from taking such a wide ranging view of its duties is its limits of power and its position in the judicial hierarchy. The Court of Military Appeals, as has been shown, occupies a position of almost supreme judicial power. Thus, as a practical matter it can use any source of law that it feels suits the needs of proper interpretation. Judge Brosman saw the court as "freer than most," with a duty to supervise and direct toward justice, the entire system of military law.<sup>194</sup> The best result in a particular case is surely available to a court with so broad a mandate and so wide a choice of sources of law.<sup>195</sup>

The most apparent problem confronting a court this free is the lack of predictability of its decisions and the possible lack of stability this may cause in the law. This problem can be off-set by a uniformity in choice of sources of law, if such uniformity can be found. At the beginning of the research for this article, the author expected research to disclose that the court preferred certain sources for certain tasks. However, just the opposite turned out to be true, that is, the court used the full range of traditional sources of law, without discrimination and merely selected the sources that they decided represented the best rule for the particular case. No single source or kind of source was given preeminence by the court. But, it is submitted that the predictability in the courts decisions occurs not as a result of the choice of the sources, but rather from the *reason* for the choice.<sup>196</sup>

With the possible exceptions of the area of sex crimes and crimes involving sex offenses, the court envisions itself as the prime protector of the justice element in military justice. The court-martial and the

<sup>192</sup> 171 F.2d 822 (D.C. Cir. 1948).

<sup>193</sup> *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 1238 (1949).

<sup>194</sup> Brosman, *The Court Freer Than Most*, 6 VAND. L. REV. 167-68 (1953).

<sup>195</sup> LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* (1960). This volume contains an excellent study of the authority techniques used by American appellate courts. At pages 217 and 218 he discusses obvious advantages of a court as free as the Court of Military Appeals.

<sup>196</sup> Compare LLEWELLYN, *op. cit. supra* note 195, at 186, 215 ("reasonable regularity" as a norm to be sought by an appellate court).

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military are cast in the role of discipline at all costs. The court's duty then is to insure that the cost in justice is not too great. However, at times, the court finds need to consider the needs of military discipline in its choice of sources of law.<sup>197</sup> Thus, it can be asserted that in the court's choice of sources of law, that source will be selected which best balances the competing interests of justice and military discipline. Therefore, although an advocate cannot point to a single source or group of sources as constituting a military common law, and use it a body of law to predict the resolution of yet undecided questions, he can by conscientious examination of the competing rules in a particular case understand the court's choice of law. Understanding will necessarily increase his ability to predict the result to be reached by the court.

Finally, while the selection principle enunciated above does not alone work like a "common law of crimes" it does give a good deal of added stability when it is used within the framework of the body of decisional law created by the court.<sup>198</sup> It is true that in the areas of constitutional rights the court is constantly breaking new ground and necessarily changing the law. But then, so are most of the appellate courts all over the country, especially the Supreme Court of the United States. Our Court would be remiss if it did not participate in this dynamic growth. The Court has said as much.<sup>199</sup>

However, as regards the common law crimes the Court has attempted to join in what it could discover was the majority rule. In a few cases the Court has carved out its own interpretation of crimes,<sup>200</sup> but when it has done so, it has proceeded with some caution and has consciously or unconsciously sought to balance the interests of justice<sup>201</sup> and the need for discipline.<sup>202</sup> The result is that their definition of substantive offenses has been stable, in that very little change has occurred from initial definition by the court, and predictable in that unless there is a serious impingement on either the interests of justice or discipline the court has accepted the tested rule of the majority. It is submitted that this approach will continue.

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<sup>197</sup> *United States v. Kunak*, 5 USCMA 346, 17 CMR 346 (1954).

<sup>198</sup> Aside from the substantive stability that is gained by the techniques noted above, stability can also be enhanced by limiting the succession in the court, either by increasing the number of men on the court or giving the present members life tenure. A combination of the two might be desirable.

<sup>199</sup> Annual Report (1962) at 51.

<sup>200</sup> See *United States v. Klutz*, 9 USCMA 20, 25 CMR 282 (1958); *United States v. Hicks*, 6 USCMA 621, 20 CMR 337 (1956).

<sup>201</sup> See *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960).

<sup>202</sup> See *United States v. Kunak*, 5 USCMA 346, 17 CMR 346 (1954).

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Therefore, taking into consideration the stability of the definitions of the substantive offenses and the selection principle that the court uses anytime this stability is upset, there is indeed something that works like a “common law of crimes.” This law is reducible to a body of rules and norms as is the criminal law in any jurisdiction in the United States. The norms are not useful in the creation of new offenses, but rather to explain, clarify and understand the crimes proscribed in the *Uniform Code of Military Justice*.



# A COMPARISON OF THE TURKISH AND AMERICAN MILITARY SYSTEMS OF NONJUDICIAL PUNISHMENT\*

BY FIRST LIEUTENANT HIKMET SENER \*\*

## I. INTRODUCTION

### A. BACKGROUND OF MILITARY JUSTICE IN THE UNITED STATES

A full exploration of the history of the *Uniform Code of Military Justice* and today's system for the administration of criminal law in the Armed Forces of the United States would ultimately lead back to the Greeks and Romans who seem to have developed a crude system of military justice, and to the Crusaders who had the first known formal military code. From these sources evolved the British Articles of War, on which the Thirteen Colonies modelled the first American Articles of War.<sup>1</sup> For the purposes of this article, however, it is sufficient to note that the United States Constitution, Article I, Section 8, empowers Congress to make "Rules for the Government and Regulation of the land and naval forces."<sup>2</sup> Under this authority, Congress has over the years enacted and frequently revised the Articles of War for the regulation of the Army,<sup>3</sup> Articles for the Government of the Navy,<sup>4</sup> and, finally,

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<sup>1</sup> See EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 8 (1956).

<sup>2</sup> The term "land forces" as used in the Constitution of the United States includes both the Army and the Air Force. See 10 U.S.C. § 3001 (1958).

<sup>3</sup> For a short history of the American Articles of War, see Kock, *An Introduction to Military Justice in France*, 25 MIL. L. REV. 119, 121-22 (1964).

<sup>4</sup> The first such body of American naval law was the Rules for the Regulation of the Navy, adopted by a resolution of the Continental Congress on 28 November 1775. See 3 JOURN. CONT. CONG. 378-387. These rules were somewhat revised, and first Constitutionally enacted into law by the Act of 2 March 1799, 1 Stat. 709; substantially revised by the Act of 23 April 1800, 2 Stat. 45; again substantially revised by the Act of 17 July 1862, 12 Stat. 600; clarified, revised and consolidated with other statutes of the United States pertaining to the Navy by Act of 27 June 1874, Rev. Stat. Sec. 1624 (1875). With minor changes, these Articles were codified and remained in effect until enactment of the UCMJ. See 34 U.S.C. § 1200 (1946).

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the present *Uniform Code of Military Justice* (hereinafter referred to as the "UCMJ"), applicable to all United States Armed Forces. Article II, Section 2, of the Constitution provides that the President shall be Commander in Chief of the Army and Navy and of the militia of the several states when called into the actual service of the United States. By reason of this authority,<sup>5</sup> Presidents have promulgated various Executive Orders pertaining to military justice. In fact, the United States *Manual for Courts-Martial*, which, among other things, prescribes the rules of evidence and procedure to be used by courts-martial and the maximum punishments imposable thereby, is itself an Executive Order.<sup>6</sup>

Until 1951 the United States Army and Air Force operated under the Articles of War. The Navy was governed by the Articles for the Government of the Navy, and Coast Guard justice was like that of the Navy. This inter-service diversity in the methods of administering military justice contrasted with the movement after World War II toward unification by the Armed Forces. The UCMJ, which became effective May 1, 1951, unified, revised, and codified the Articles of War, and the Articles for the Government of the Navy, Marine Corps, and Coast Guard, bringing all the United States Armed Forces into the same framework of law. The UCMJ consists of eleven parts and 140 articles. Article 15 of the UCMJ, however, which pertains to nonjudicial punishment, was revised in 1962.<sup>7</sup> These newly revised nonjudicial punishment provisions became effective on February 1, 1963.

### B. BACKGROUND OF MILITARY JUSTICE IN TURKEY

The military justice system, in effect during the Ottoman Empire early in the nineteenth century, consisted of numerous laws, regulations, and customs of the military service developed over many years which had never been considered as a whole or enacted into a single, integrated military code. Until 1930 this was the body of law that constituted the Turkish system of military justice. Many revisions were made in these laws during the 100 years this system was in force. After World War I and the Turkish Independence War, the Ottoman Empire was replaced by the new Turkish Republic, whose foundations were established upon a modern Constitution and a series of Constitutional Laws, enacted on

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<sup>5</sup> See also Article 36 of the UCMJ, which authorizes and directs the President to prescribe rules and regulations concerning rules of evidence and procedure for use in cases tried before courts-martial under the UCMJ.

<sup>6</sup> Exec. Order No. 10214 (1951).

<sup>7</sup> 10 U.S.C. § 815, as amended by P.L. 87-648, §1, 87th Cong., 2d Sess.. 76 Stat. 447 (1962). Unless otherwise stated, all references hereinafter to Article 15 refer to Article 15, as amended.

## TURKISH NONJUDICIAL PUNISHMENT

October 29, 1923. After the establishment of the Turkish Republic, the military justice system developed during the Ottoman Empire was generally considered to be unconstitutional, and an entirely new *Turkish Military Criminal Code and Military Criminal Procedure Code* were prepared and accepted by the Turkish Great National Assembly in 1930. The *Turkish Military Criminal Code* was enacted by Law Number 1932, which became effective on June 14, 1930. The *Turkish Military Criminal Procedure Code* was enacted by Law Number 1931 and became effective on June 15, 1930. Both codes were prepared to meet the administrative needs of the Turkish Armed Forces, and were based upon a thorough survey of the German, Belgian, and French military codes. The *Turkish Military Criminal Code* (hereinafter referred to as the "TMCC") contains two parts and, over all, 195 articles. The first part deals with military offenses, misdemeanors, and their punishment; part two, consisting of Articles 162 through 192, deals with nonjudicial punishment. Both the TMCC and *Military Criminal Procedure Code* have since been revised a number of times to meet the changing needs of the Turkish Armed Forces.

It is to be expected that the United States and Turkish systems of military justice would differ in many respects. In spite of these differences, however, the armed forces of both countries share the same basic need for a workable system of nonjudicial punishment. The most important inquiry is whether the nonjudicial punishment systems of both countries are properly adapted to the personnel structures and needs of their respective armed forces. If either system, or a part of either system, does not meet this test, solution should be found that will make each country's system responsive to its military needs.

Accordingly, it seems best first to outline the personnel structures of the armed forces of each country, and the basic philosophy and purposes of nonjudicial punishment in both systems. We shall then compare the substantive prerequisites for the imposition of nonjudicial punishment, and the punishments that may be imposed, in both Turkey and the United States, followed by some detailed comparisons of key procedural rules in both systems. Consideration will then be given to whatever changes and recommendations seem desirable, on the basis of these comparisons. Before proceeding, a general word of caution is in order: throughout this article, all quotations, paraphrases and characterizations of provisions of Turkish law are based on the *author's* translations, and are not to be regarded as official.

## II. MILITARY PERSONNEL IN THE ARMED FORCES OF THE UNITED STATES AND TURKEY

### A. *IS THE UNITED STATES*

The Armed Forces of the United States consist of the Army, Air Force, Navy and Marine Corps.<sup>8</sup> Generally, the regular personnel of the Armed Forces are composed of commissioned officers, warrant officers, cadets attending the Army or Air Force academies, midshipmen attending the Naval Academy,<sup>9</sup> and enlisted personnel. Although the personnel structures of the Army and Air Force are quite similar in many respects, such as grade or rank, pay grade, and military title of address, the Savy and Marine Corps differ in many respects.

A "commissioned officer" holds his grade and office under a commission issued by the President. In the Army, the lowest grade for a commissioned officer is that of second lieutenant.<sup>10</sup>

In general, a "warrant officer" holds his grade and office under a warrant issued by the Secretary of the Army, Savy, or Air Force. He is a skilled technician required to fill positions above enlisted grades that are too specialized to permit the effective utilization of more broadly trained commissioned officers.<sup>11</sup> The Army and Air Force have only warrant officers. The Kavy, however, also has "commissioned" warrant officers, who receive commissions as such from the President, and who rank below ensigns but above warrant officers. All warrant officers generally have quite limited command authority although the "commissioned" warrant officer of the Navy has greater command authority than that of other Navy warrant officers.

The enlisted personnel of the various Armed Forces of the United States comprise the most diverse class of military personnel. The term

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<sup>8</sup> Upon declaration of war or when the President directs, the Coast Guard operates as a service in the Savy. See 14 U.S.C. § 3 (1958). When operating as a service in the Navy, the Coast Guard together with the Savy and Marine Corps are, for the purposes of the UCMJ, regarded as one armed force. See UCMJ, art. 1(2).

<sup>9</sup> Cadets or midshipmen attending one of the Military or Naval Academies are members of the Regular Armed Forces, with rank above that of enlisted personnel but below that of commissioned or warrant officers. See 10 U.S.C. §§ 3075, 8075 (1958); ARMY REGS. SO. 600-20, para. *i* (3 July 1962). As such they are subject to the UCMJ. See Arts. 1 and 2, 10 U.S.C. §§ 801, 802. There are also person? who are members of a Reserve Officer Training Corps, who undergo military training while attending civilian universities, but such cadets have no military status until the successful completion of such training and appointment as commissioned officers. Accordingly, while ROTC cadets, they are not subject to the UCMJ.

<sup>10</sup> ARMY REG. NO. 320-5, DICTIONARY OF UNITED STATES ARMY TERMS (13 Jan. 1961).

<sup>11</sup> *Ibid.*

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“enlisted member” includes all persons serving in enlisted grade, both male and female. The enlisted members of the Armed Forces are distributed into nine pay grades, E-1 through E-9. There are three distinct classes of enlisted personnel in the Army: (a) noncommissioned officers, (b) specialists, and (c) private soldiers. A noncommissioned officer is an enlisted member in pay grade E-4 or higher, other than a specialist, who fills positions requiring qualities of leadership. A specialist is an enlisted member in the Army in pay grade E-4 or higher who fills positions requiring technical skills. Specialists do not exercise command, and regardless of pay grade rank below all noncommissioned officers. In the Army, the relationship of “specialists” to “noncommissioned officers” is quite similar to the relationship that exists between warrant officers and commissioned officers. However, the concept of “specialist” as a separate class of enlisted personnel is not used by the other Armed Forces. Pay grades E-1 through E-3 are allocated to enlisted members who are private soldiers.

Each of the Armed Forces of the United States has a large body of Reserve military personnel, officer and enlisted, who may be serving on active duty or merely in an inactive status subject to being ordered to active duty. The Reserve forces have much the same personnel structure as that of the Regular forces.

### B. I S TCRKEY

Although military service is not compulsory for all male citizens of the United States, it is compulsory for *all* male citizens of Turkey. Under the Turkish Military Service Law (Law Number 1111) all male Turkish citizens over twenty years of age who have no excuse pertaining to health must at some time perform military service. The period of compulsory military service is two years in either the Army or Air Force, but two and one half years in the Navy. A person over twenty years of age who is a student in any school or university may be deferred from compulsory military service until his education is completed. In practice, maximum age limitations imposed by the regulations of schools and universities for admission and continuance as students therein fix the ages beyond which military service can no longer be deferred. If a student reaches a maximum age so prescribed, he must postpone further education until completion of his compulsory military service. In addition, the Turkish Military Service law also prescribes a maximum limit of thirty-one years of age for the deferment of any individual who, after graduation from a university, is engaged in postgraduate study or research in any branch of learning, whether in or out of Turkey. This latter age limit was intentionally placed high in order to avoid interruption of postgraduate work by

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military service. However, if an individual has not completed his post-graduate work by age thirty-one, he must nevertheless begin his compulsory military service at that time. The Turkish Military Service Law covers the subject of deferment from compulsory military service by clear and explicit rules that leave no room for argument. The subject of deferment from compulsory military service is particularly important in Turkey because the entire structure of the reserve elements of the Turkish Armed Forces is founded upon the varying degrees of education of its personnel.

One who does not voluntarily report for military service, without reasonable excuse, after reaching the age beyond which such service may no longer be legally deferred, may be punished under the TMCC. If such a person must be apprehended, his punishment may be more severe. However, even though "compulsory," this two-year period of military service is regarded as most honorable duty by all citizens of the Turkish nation, for Turkey has for centuries depended upon her armed forces. Every small boy grows up knowing that one day he will be a soldier. When the time for his military service arrives, he is eager to join the armed forces.

All Turkish male citizens who are not high school graduates serve as privates.<sup>12</sup> The law defines a private to be a soldier without rank, whose needs are provided and undertaken by the government.<sup>13</sup> Privates are transferred into units after completing basic military training. Those privates who demonstrate ability and competence through proficiency testing are chosen by their company commanders to receive further training to become "acting noncommissioned officers."<sup>14</sup> The law provides that acting noncommissioned officers are soldiers, with the rank of corporal first class or corporal second class,<sup>15</sup> whose needs are provided for and undertaken by the government.<sup>16</sup> Although these higher ranks are not pay grades, acting noncommissioned officers have important roles in maintaining discipline among the privates in their units. Both privates and acting noncommissioned officers are released from active duty after two years' service, but they remain Reserve personnel until they reach 46 years of age. During a national emergency they may be called to arms.

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<sup>12</sup> The term "private" is used in place of "Er."

<sup>13</sup> Turkish Armed Forces Internal Service Law, 1961, Article 2(1).

<sup>14</sup> The term "acting noncommissioned officer" is used in place of "Erbas."

<sup>15</sup> The terms "corporal first class" and "corporal second class" are used in place of "Kıta cavusu" and "onbasi."

<sup>16</sup> Turkish Armed Forces Internal Service Law, 1961, Article 2(2).

## TURKISH NONJUDICIAL PUNISHMENT

Before 1961, both high school and university graduates served as Reserve officers. However, under the provisions of a law which became effective in 1961, a new class of personnel was brought into the Turkish Armed Forces and the Turkish national educational system. Under this law, each person who is a high school graduate, but not a university graduate, performs his two years of compulsory military service as a teacher in the primary schools of the villages or districts. In accordance with Law Number 97, the term "Reserve Officer Teacher" is used for this class of personnel. Reserve Officer Teachers wear civilian clothes while they are teaching. During the summer months when the schools are in holiday, they are assigned to a unit of the Armed Forces for military training, and during such training wear military uniforms and have the rank of second lieutenant.<sup>17</sup> They are appointed and paid by the Ministry of National Education as teachers. After completing two years of such service, they are released from active duty and become Reserve officers with the rank of lieutenant,

While serving a two-year term on active duty as Reserve Officer Teachers, these individuals are subject to military criminal jurisdiction for any offenses they may commit. When they are serving as teachers, their disciplinary Commanding officer is the commanding officer of the closest garrison in that district. Nonjudicial punishment may be imposed upon Reserve Officer Teachers by such garrison commanders. So far as nonjudicial punishment is concerned, Reserve Officer Teachers are treated exactly as commissioned officers.

One of Turkey's most important problems is national education. The majority of the population live in small villages and are agricultural people. The Ministry of National Education, faced with the difficulty of finding enough teachers for these villages, developed this new system of using Reserve officers as teachers. The system is designed to quickly provide enough teachers so that every person can get a primary education. If properly administered, this system should accomplish its purpose.

Each person who is a university graduate, or the equivalent, serves as a Reserve officer. After he completes a six-month period of instruction at a Reserve officers' school, he is appointed to a military unit with the rank of second lieutenant. After serving one and one-half years as an officer, he is released from active duty with the rank of lieutenant. There is no difference between commissioned officers of the Regular Armed Forces and Reserve officers while on active duty.

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<sup>17</sup>There are *three* ranks of lieutenant in the Turkish Armed Forces—second lieutenant, lieutenant, and first lieutenant.

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The Regular Armed Forces of Turkey are composed of commissioned officers, commissioned warrant officers,<sup>18</sup> and military students.

The law provides that a commissioned officer is a soldier commissioned in the Regular Armed Forces, under an appropriate law, with the rank of second lieutenant through marshal.<sup>19</sup> There are twelve commissioned grades, each allocated to a separate pay grade. Military students who graduate from the Army, Navy, or Air Force Academies—or from a civilian university, if trained in one of the learned professions such as law, medicine, or engineering—are initially appointed in one of the Regular Armed Forces in the grades of second lieutenant or lieutenant. Commissioned officers of the Regular Armed Forces are obligated to serve for ten years after such appointment. They may not be separated in any way from the Armed Forces except for disability or incompetence pursuant to an administrative determination, or for cause pursuant to a judicial decision. They may resign voluntarily only after completing ten years' service. However, such a resignation must be accepted by the Ministry of National Defense. During a national emergency, the Ministry of National Defense may not accept a resignation.

A commissioned warrant officer is a soldier who joins the Regular Armed Forces, under an appropriate law, with the rank of CWO-1 through CWO-4.<sup>20</sup> Commissioned warrant officers are educated in special military commissioned warrant officer schools to which they are assigned after completing high school. The Army, Navy, and Air Force each have their own commissioned warrant officer schools. Those who graduate from these schools are initially appointed in the grade of CWO-1<sup>21</sup> and are also obligated to serve for ten years after such appointment as commissioned warrant officers.

Although a ten-year period of compulsory duty may seem to be a deprivation of individual rights, this requirement is essential and appropriate to the needs of Turkey. To have a powerful armed force, commissioned officers and commissioned warrant officers—the backbone of the Regular Turkish Armed Forces—must be composed of individuals who select military service as a career. In practice, only those who like military service and choose it as a profession enter upon a ten-year period of service. To the career officer, this ten-year requirement is not

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<sup>18</sup> The term "commissioned warrant officer" is used in place of the term "Assubay." This officer is equivalent in function and status to a career noncommissioned officer in the United States Armed Forces.

<sup>19</sup> Turkish Armed Forces Internal Service Law. 1961, Article 1(6).

<sup>20</sup> See Turkish Armed Forces Internal Service Law. 1961, Article 3.

<sup>21</sup> "Assubay Cavus."

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a hardship. He joins the Regular Armed Forces voluntarily with the intention of serving as a soldier until his retirement.

“Military students” are individuals who are being educated in various military schools or civilian universities to become commissioned officers or commissioned warrant officers. They wear an appropriate military uniform while so engaged.<sup>22</sup> Even those military students who are being educated at a civilian university to become military lawyers, doctors, or engineers, wear a special student uniform and are required to live in one of the special military schools therefor, subject to the same discipline as cadets and midshipmen. Students at a commissioned warrant officer school also wear a special student uniform. All commissioned officers and commissioned warrant officers of the Turkish Armed Forces receive some specialized military training at one of the military academies or schools.

Having outlined the personnel structure of the Turkish and United States armed forces, it will now be appropriate to get a general view of the function and purpose of nonjudicial punishment in both systems.

### III. ROLE AND PURPOSE OF NONJUDICIAL PUNISHMENT

Both Article 15 of the UCMJ and the comparable articles of the TMCC are designed to provide a means whereby military commanders can deal with minor infractions of discipline without resort to trial by a military criminal court. Under each system, commanders are authorized to impose certain limited punishments for minor offenses and infractions of discipline without resort to trial by court-martial. This sort of punishment is referred to as “nonjudicial” punishment because the imposition of such punishment is not the consequence of a conviction of crime. Since such punishment is not to be considered in any manner as a conviction of a crime, the rules and procedures governing the military systems of nonjudicial punishment in both the United States and Turkey are entirely separate from their respective court-martial systems. In both countries, however, nonjudicial punishment is within, and forms an essential part of, the traditional military criminal law system.<sup>23</sup>

The commanding officer of any military unit must maintain the discipline of his unit. To maintain discipline, which is the foundation of military services, minor disciplinary infractions must be handled promptly and effectively. The unit commanding officer knows the

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<sup>22</sup> Turkish Armed Forces Internal Service Law, 1961, Article 1(4).

<sup>23</sup> U.S. DEPT OF ARMY, PAM. SO. 27-101-113 (62JALS 113/2-3) (19 Dec. 62).

offender well, and thus can best determine the most appropriate kind and amount of punishment for the individual offender who violates the discipline of his unit. He is in the best position to consider the offender's age, experience, intelligence, prior civilian and military record, and all the other relevant facts and circumstances of the case, in order to decide whether to impose severe or light punishment.

The official report of the National Defense Committee of the Turkish Great National Assembly upon the TMCC prior to its enactment in 1930 indicates that the Committee believed that, by putting provisions for nonjudicial punishment in the bill, the trial of offenders by court-martial for all disciplinary infractions could be avoided, without sacrificing the discipline that is the foundation of an armed force. Moreover, the Committee believed that such provisions would assure just and considerate administration, and would serve to protect subordinates from harsh injustice by their superiors.

It is as important to preserve an offender's service record from unnecessary stigmatization as it is to maintain the discipline of the unit. The strict requirements as to conduct while in military service are *sui generis* in relation to civilian standards of conduct. An act that is not punishable under civilian law may constitute an offense under military law. Nevertheless, one who is convicted by a court-martial, even for a purely military offense, carries with him the stigma of a criminal conviction for the rest of his life.

The United States House Armed Services Committee, during studies preparatory to the revision of Article 15, UCMJ, according to a Department of the Army report on such deliberations, was equally concerned with problems of this nature:

[A] member of the Armed Forces who is convicted by court-martial is stigmatized with a criminal conviction on his record that is with him not only throughout his service career but follows him into civilian life. It may interfere with his job opportunities (as, for example, when he is required to show on a questionnaire whether he has ever been convicted), and it may adversely reflect on him if he is involved in difficulty with a civilian law enforcement agency.

The Committee . . . feels that if his offense is a minor one, and adequate provision can be made in the law to authorize the deterrent punishment necessary to maintain military discipline, without resort to court-martial, this should be done.<sup>24</sup>

To meet the needs thus recognized, Article 15, UCMJ, was revised in 1962. Under these new provisions, nonjudicial punishment is primarily corrective in nature. At the same time, it can serve as a lesson to others.

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<sup>24</sup> H.R. REP. NO. 1612, 87th Cong., 2d Sess. 3 (1962).

## TURKISH NONJUDICIAL PUNISHMENT

The basic purposes of Article 15, UCMJ, are set forth in United States Army Regulation 22-15 as follows:<sup>25</sup>

Nonjudicial punishment may be imposed in appropriate cases to—

- a. Correct, educate, and reform offenders who have shown that they cannot benefit by less stringent measures;
- b. Preserve, in appropriate cases, an offender's record of service from unnecessary stigmatization; and
- c. Further military efficiency by disposing of minor infractions of good order and discipline in a manner requiring less time and personnel than a trial by court-martial.

Another important principle, noted in the official report of the Turkish National Defense Committee, is that when power is given to commanding officers to impose nonjudicial punishment upon subordinates, whatever system that may be adopted to control the exercise of such power must assure its just use. Commanding officers must be very careful to exercise their powers in a just manner and always with concern for the individual offender as well as for the maintenance of discipline within the command.

In the TMCC the term "disciplinary punishment" is used in place of "nonjudicial punishment." The term "nonjudicial punishment" seems more descriptive because it serves to explicitly distinguish such punishment from court-martial proceedings, and, as explained above, the purpose of nonjudicial punishment is not limited to the maintenance of discipline in the command. It has other purposes, too, such as preserving the minor criminal offender's record from unnecessary stigmatization. Since the term "disciplinary punishment," as used in the TMCC, has exactly the same meaning as "nonjudicial punishment," as used in the UCMJ, hereinafter in this article, I shall use only the term "nonjudicial punishment."

Thus although the personnel structures of the Turkish and American armed forces differ in many respects, the basic philosophy and purpose of nonjudicial punishment in both systems is the same.

### IV. AUTHORITY TO IMPOSE NONJUDICIAL PUNISHMENT

#### A. WHO MAY IMPOSE NONJUDICIAL PUNISHMENT

##### 1. *United States.*

Under Article 15, UCMJ, a commanding officer may impose non-

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<sup>25</sup> ARMY REG. No. 22-15, para. 4 (20 Nov. 1963). These are the regulations implementing the new Article 15, UCMJ, for the Army, and will hereinafter be referred to simply as "AR 22-15."

judicial punishment, for minor offenses, upon commissioned officers, warrant officers and other military personnel of his command.<sup>26</sup>

The term "commanding officer" as used in these regulations, refers to a commissioned or warrant officer who by virtue of his rank and assignment exercises primary command authority over a military organization or prescribed territorial area which under pertinent official directives is recognized as a "command."<sup>27</sup>

"Commands" include companies and batteries, numbered units and detachments, missions, Army elements of unified commands and joint task forces, service schools, area commands, and, in general, any other organization of the kind mentioned in the quotation above, the commander of which is the one looked to by superior authority as the person chiefly responsible for the discipline of those in his charge. Thus, an infantry company, even if it is not separate or detached, is considered to be a "command," but an infantry platoon which is part of a company, and not separate or detached is not a command.<sup>28</sup>

## 2. Turkey.

Article 162 of the TMCC provides that any "commanding officer"<sup>29</sup> has authority to impose nonjudicial punishments upon his subordinates. Article 170 provides that the commanding officer who is the offender's immediate commander imposes the nonjudicial punishment. The terms "commanding officer" and "command" are much broader than in Article 15, UCMJ. In the Turkish nonjudicial punishment system, the kinds and amounts of punishments, the commanders who may impose them, and the offenders upon whom they may be imposed, depend upon the ranks both of commanding officers and offenders, from corporal second class to marshal. All commanders have authority to impose some kinds of nonjudicial punishment on certain ranks of offenders, under specified circumstances. Article 171 of the TMCC prescribes the authority of various commanding officers to impose various kinds of nonjudicial punishments, and is summarized below in chart form.<sup>30</sup> As this chart indicates, even a corporal second class, if he is the commanding officer of a separate unit, has authority to impose certain kinds of nonjudicial punishment upon his subordinates. Rising from this rank through the rank of lieutenant, the commander of a separate unit may impose various additional punishments, the relative severity of which increases with

<sup>26</sup> MANCAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 128 (Addendum. 1963) [hereinafter cited as MCM. 1951, which citation includes Manual references as amended].

<sup>27</sup> AR 22-15, para. 2a(1).

<sup>28</sup> AR 22-15, para. 2a(2).

<sup>29</sup> The term "commanding officer" is used in place of "Amir."

<sup>30</sup> See chart 3, *infra* p. 141.

## TURKISH NONJUDICIAL PUNISHMENT

the rank of the commander. In addition, the authority of a second lieutenant, lieutenant, or first lieutenant to impose certain kinds of nonjudicial punishment upon his subordinates is greater if he is the commander of a separate unit. For instance, only when one of these officers is the commander of a separate unit may he impose the punishment of "arrest room". In other words, a lieutenant who is the commander of a platoon has authority to impose certain kinds of punishment, even if his platoon is not separated. But if the platoon is separated, his authority is increased. In order to maintain discipline, junior officers need increased authority when they are in command of separate units, not adjacent to a more senior command. In practice, however, the lowest ranking officer who ordinarily imposes nonjudicial punishment is a company commander with the rank of captain.

Under the TMCC there is one exception to the rule that punishment may be imposed only by a commanding officer. Article 171 authorizes the Minister of National Defense<sup>31</sup> to impose certain kinds of nonjudicial punishment upon members of the Armed Forces, as set forth in Chart 3. Thus, he may impose only a reprimand upon general officers. In practice, however, this power, although expressly provided by law, has seldom been used.

Under the constitutions of both the United States and Turkey, the Presidents of both countries are designated the "Commander in Chief" of their respective Armed Forces. However, because the TMCC sets forth specifically who may impose nonjudicial punishment, specifically authorizing the Minister of National Defense to impose such punishment without any mention of the President of Turkey, it can be persuasively argued as a matter of statutory construction that the Turkish Great National Assembly in enacting the *Turkish Military Criminal Code* did not intend to authorize the President of Turkey to impose nonjudicial punishment upon members of the Turkish Armed Forces. On the other hand, Article 15, UCMJ, uses only the term "commanding officer" as the one authorized to impose nonjudicial punishment. Hence, in view of the firmly established United States doctrine that the President of the United States is a "Commanding officer," clothed with all the attributes of a military commander, it seems clear that the President of the United States has authority to impose nonjudicial punishment under Article 15, UCMJ. As a practical matter, however, the question appears moot under the systems of both countries.

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<sup>31</sup> The Minister of National Defense is a civilian. In Turkey there are no separate military departments of Army, Navy, and Air Force headed by a civilian secretary, as there are in the United States. The Turkish Army, Navy and Air Force are commands, each of which is commanded by a military officer. These commanding officers are responsible directly to the Ministry of National Defense.

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### B. UPON WHOM MAY NONJUDICIAL PUNISHMENT BE IMPOSED?

#### 1. *United States.*

Nonjudicial punishment may be imposed by a commanding officer upon officers and other military personnel of his command. "For the purpose of Article 15, military personnel are considered to be 'of the command' of a commanding officer if they are assigned to an organization commanded by him . . ." <sup>32</sup> But it is occasionally important that a commanding officer be authorized to impose nonjudicial punishment upon military personnel who are not permanent, but merely temporary members of his command. For this reason, commanders are also authorized to impose nonjudicial punishment on all military personnel affiliated with their commands by attachment, detail, or otherwise, under circumstances indicating either expressly or by implication that such commanders, as well as the commander of the unit to which the offender is assigned, may exercise such authority.<sup>33</sup> As a matter of policy, however, nonjudicial punishment is not imposed by a commander of one armed force upon a member of another armed force even if such an individual is assigned to his command.<sup>34</sup>

#### 2. *Turkey.*

Under the TMCC, nonjudicial punishment generally may be imposed upon officers and other military personnel and prisoners of war.<sup>35</sup> The term "military personnel" has roughly the same meaning as in Article 15, UCMJ.<sup>36</sup> Thus, any commanding officer may impose punishment upon the officers and other military personnel of his command. There is, however, no policy among the services of the Turkish Armed Forces, as there is in the Armed Forces of the United States, limiting the authority of a commanding officer of one armed force to punish a member of another armed force if the offender is under his command. This is particularly useful for maintaining discipline in a command composed of more than one armed force, because to request action against the offender by the commanding officer of an offender's Air Force unit would

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<sup>32</sup> AR 22-15, para. 3a.

<sup>33</sup> *Ibid.*

<sup>34</sup> See AR 22-15, para. 3c.

<sup>35</sup> TMCC, art. 164 (1930).

<sup>36</sup> In the United States, civilians accompanying the Army in time of war may be tried by court-martial, but they are never subject to nonjudicial punishment because they are not "of the command." In the Turkish system, under Article 164-B, TMCC, nonjudicial punishment may be imposed in time of war upon persons connected with the Turkish Armed Forces because of duty, contract or any other reason, and who follow the Turkish Armed Forces.

## TURKISH NONJUDICIAL PUNISHMENT

cause frequent delay in the punishment of an Air Force offender serving with an Army unit who violates the discipline of the Army unit.

Even though under the TMCC nonjudicial punishment may be imposed upon prisoners of war, there is no mention in the law, or in the chart included in Article 171 as to who may impose such punishment or what kinds of punishment may be imposed. Article 164, which mentions prisoners of war, should be revised since, under international law as expressed in the 1949 Geneva Convention, nonjudicial punishment may be imposed upon prisoners of war only as provided therein. The municipal law of Turkey must conform to international law. If Article 164 were revised to provide that nonjudicial punishment may be imposed upon a prisoner of war in accordance with the rules of international law, the problem would be solved.

Another difference between the nonjudicial punishment systems of the United States and Turkey concerns punishment of the military lawyer. In the TMCC the term "military judge" is equivalent to the American terms "judge advocate" as used in the Army and Air Force or "law specialist" as used in the Navy and Coast Guard.<sup>37</sup> Under the Turkish system, a distinction is made between "military judges" and other "commissioned officers," with respect to the imposition of nonjudicial punishments. Although the punishments of "arrest room"<sup>38</sup> or "arrest in quarters" may be imposed upon commissioned officers, these punishments may not be imposed upon military judges.<sup>39</sup> Only the punishments of reprimand, severe reprimand<sup>40</sup> and forfeiture of pay may be imposed upon them. In practice, however, even this authority is seldom used.

### *C. FOR WHAT KINDS OF OFFENSES MAY NONJUDICIAL PUNISHMENT BE IMPOSED?*

#### *1. United States.*

Under Article 15, UCMJ, nonjudicial punishment may be imposed only for "minor offenses." Attention must be paid both to the term "minor" and to the term "offenses," as used in Article 15, UCMJ. Thus, conduct is punishable under Article 15 only if the act or omission of the offender is forbidden by a specific punitive article of the UCMJ. An act that is not made criminal by the UCMJ, no matter how repreh-

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<sup>37</sup> The term "military judge" is used in place of the term "Askeri Adli **Hakim**."

<sup>38</sup> See pp. 13748, *infra*.

<sup>39</sup> TMCC, art. 173(3) (1930).

<sup>40</sup> See p. 135, *infra*.

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sible, may not be punished under Article 15.<sup>41</sup> Whether an offense may be considered "minor" depends upon its nature, and all the circumstances surrounding its commission. Generally speaking, an offense is riot to be considered "minor" if it could be punishable by dishonorable discharge, or confinement for more than one year, or if the offense is more serious than those normally tried by summary courts-martial.<sup>42</sup>

### 2. *Turkey.*

Under the TMCC, nonjudicial punishment may be imposed for "disciplinary infractions" and military "misdemeanors."<sup>43</sup> "Disciplinary infractions" are acts which violate discipline or military morale but which are not specifically mentioned in any article of the military criminal laws.<sup>44</sup> The TMCC specifies those acts that constitute military "crimes" as distinguished from military "misdemeanors" (although the same act constituting a military crime might, if committed by a civilian, constitute only a civilian misdemeanor). Commanders may not impose nonjudicial punishment for military "crimes." These are triable only by court-martial. "Disciplinary infractions," on the other hand, are punishable only by nonjudicial punishment; military "misdemeanors" subject offenders to *either* nonjudicial punishment or court-martial.

For example, if a private is AWOL for less than **24** hours, his act is not a military "misdemeanor"; it is only a "disciplinary infraction." This is because AWOL for less than **24** hours is not expressly defined *to* be either a military "crime" or "misdemeanor" in the TMCC. On the other hand, AWOL for more than **24** hours is expressly defined by the TMCC to be a military "misdemeanor." Thus, an AWOL of less than **24** hours is only a "disciplinary infraction." Such an offender may not be tried by court-martial. In addition, his commanding officer has authority in such a case to impose nonjudicial punishment or no punishment at all.<sup>45</sup> This provision is very effective for maintaining discipline, since it gives the commander discretion whether to punish the offender at all, and also gives him broad authority to impose punishment for *all kinds* of disciplinary violations. It is arguable that such authority contravenes the general principle—discussed above, and followed in the

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<sup>41</sup> See MCM, 1951, para. 128*b*; U.S. DEP'T OF ARMY, PAM. TO. 2T-101-113 (62 JALS 113/7-9) (19 Dec. 62).

<sup>42</sup> MCM, 1951, para. 128*b*. The Army has broadened the concept of "minor" offenses, however, by dropping any reference to offenses "normally tried by summary court-martial," and by noting that the Manual's criterion of confinement for more than one year is "not a hard and fast rule" and that all the circumstances of the particular case must be considered. See AR 22-15, para. 3*d*.

<sup>43</sup> See TMCC, art. 162 (1930).

<sup>44</sup> TMCC, art. 162-A (1930).

<sup>45</sup> See TMCC, art. 163-3 (1930).

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United States in administering Article 15, UCMJ— that nonjudicial punishment may not be imposed unless the act or omission is specifically made criminal by some provision of the military code of which it is a part. Such an argument, however, would be superficial and misleading since, unlike the UCMJ, the TMCC does not elevate any undefined, amorphous body of disciplinary infractions to the status of court-martial offenses.<sup>46</sup>

As noted above, AWOL for more than 24 hours is a military “misdemeanor.” Any person who commits a military “misdemeanor” must be punished.<sup>47</sup> In the case of military “misdemeanors,” Commanding officers have only the right either to impose nonjudicial punishment or to send the case to trial by court-martial.<sup>48</sup> Other examples of military “misdemeanors” include any person who deserts his unit but returns voluntarily in six days, a private who leaves his place of duty, or a commissioned warrant officer who is drunk and disorderly. Offenses of this nature must either receive nonjudicial punishment, or be sent to trial by court-martial. If nonjudicial punishment is imposed, the offender may not, subsequently, be tried by court-martial for the same act.

Although there is no difference between military “misdemeanors” and “disciplinary infractions” so far as the *amount* of nonjudicial punishment is concerned, there is a difference with respect to the *kinds* of punishments that may be imposed. Only the punishments of “arrest room,” “arrest in quarters,” and “confinement on bread and water” may be imposed for military “misdemeanors.” By contrast, *any* kind of punishment authorized by the TMCC may be imposed for “disciplinary infractions.” Under the TMCC, courts-martial are similarly limited in the kinds of nonjudicial-type punishments they can impose for military “misdemeanors.” They may give only three such punishments: “arrest room,” “arrest in quarters,” and “confinement on bread and water.” But, of course, even though these are nonjudicial-type punishments, they are *judicial* in nature, when imposed by courts-martial. It would seem more appropriate and effective, however, to give both courts-martial and commanding officers authority to impose *all* kinds of nonjudicial-type punishments for “misdemeanors.”

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<sup>46</sup> In the United States, however, UCMJ, Art. 134, is a “general article!” which, in part, makes criminal “all disorders and neglects to the prejudice of good order and discipline in the armed forces.” and “all conduct of a nature to bring discredit upon the armed forces.” There is no comparable article in the TMCC.

<sup>47</sup> TMCC, art. 162-3 (1930). In the United States the commander “may” impose nonjudicial punishment. UCMJ, art. 15(b)(c). Thus, he has discretion whether to use punitive measures at all, including Article 15. See MCM, 1951, para. 129.

<sup>48</sup> TMCC, art. 162-2 (1930).

## D. DELEGATION OF AUTHORITY

Under the UCMJ, authority to impose Article 15 punishment is an attribute of command and normally may not be delegated. If authorized by regulations of the Secretary concerned, however, a commanding officer exercising general court-martial jurisdiction, or an officer of general or flag rank in command may delegate his powers under Article 15 to an officer who is one of his "principal assistants."<sup>49</sup> Army Regulations have authorized such delegation, and have defined a "principal assistant" as "an officer of his command exercising the function of Deputy or Assistant Commander."<sup>50</sup> The officer to whom such powers are delegated has the same authority under Article 15 as the officer who delegated the power, unless otherwise limited.<sup>51</sup>

Under the TMCC, a commander's authority to impose nonjudicial punishment is also regarded as an attribute of command and may not be delegated under any circumstances. Officers acting as commanders of units during the temporary absence of the unit's regular commander, however, have authority to impose nonjudicial punishment in their own right but in accordance with the grade prescribed for the commander of the unit and without regard to the acting commander's actual grade.<sup>52</sup> For example: If the commander of a battalion is a lieutenant colonel and a major is acting commander during the temporary absence of the lieutenant colonel, such an acting commander has the same authority to impose nonjudicial punishment as does a lieutenant colonel.<sup>53</sup>

## E. LIMITATIONS ON AUTHORITY

Under the UCMJ, any commanding officer having disciplinary authority under Article 15 may limit or withhold the exercise by his subordinate commanders of the disciplinary authority they otherwise possess. For example, limitations are frequently imposed on the powers of subordinate commanders to impose nonjudicial punishment on officers and warrant officers or on noncommissioned officers and specialists of the top three pay grades, when a superior commander desires to reserve to himself or to his delegee the right to consider all cases involving these categories of personnel.<sup>54</sup>

Under the TMCC, superior commanders have no such limiting authority. It is argued, in the United States, that this limiting authority per-

<sup>49</sup> See UCMJ, art. 15(a).

<sup>50</sup> AR 22-15, para. 2b(1).

<sup>51</sup> MCM, 1951, para. 128a; AR 22-15, para. 2b(3).

<sup>52</sup> TMCC, art. 172 (1930).

<sup>53</sup> See chart 3, *infra* p. 141.

<sup>54</sup> MCM, 1951, para. 128a; AR 22-15, para. 2c.

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mits the superior commander to insure uniformity in punishment of key personnel within his command, and prevents misuse of punishment authority by inexperienced officers. But, in spite of this, it would appear to unjustifiably weaken the authority as well as the morale of subordinate commanders. An officer who is unable to use sound judgment in the exercise of authority ought not to be a commander in the first place. In addition, in both the United States and Turkish systems, offenders have the right to appeal any punishment which they consider to have been unjustly imposed. Upon appeal, superior commanders can set aside or mitigate any punishments unwisely imposed by an inexperienced commander. (In the United States, superior commanders have, in addition, the authority to remit or suspend such punishments.) This should be sufficient to preserve the authority of a superior commander.

### F. REFERENCE TO SUPERIOR AUTHORITY

Under both Article 15, UCMJ, and the TMCC, if a commanding officer determines that his authority is insufficient to make a proper disposition of the case, he may refer the case to a superior commander for appropriate disposition.<sup>55</sup> There is no difference between the two systems in this respect. If a commander's authority to impose punishment under Article 15, UCMJ, has been withheld or limited, he may also refer the case to a superior commander,

### G. DOUBLE PUNISHMENT PROHIBITED

In both systems, when nonjudicial punishment has been imposed for an offense not major in character,<sup>56</sup> nonjudicial punishment may not again be imposed upon the offender for the same offense, either by the commanding officer who imposed the punishment or by any other commanding officer. However, under the UCMJ, if the offense is major but was improperly disposed of under Article 15, nonjudicial punishment is not a bar to subsequent trial by court-martial for that offense. Nevertheless, the accused may show at such a trial, in mitigation of the punishment, that he had previously been subjected to nonjudicial punishment, and what punishment, if any, he received.<sup>57</sup> There is no difference between the two systems in this respect either. Under the TMCC, the imposition of nonjudicial punishment for an offense which that Code requires to be tried by court-martial, *i.e.*, a military "crime,"

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<sup>55</sup> See TMCC, art. 178 (1930); MCM, 1951, para. 129a.

"Under UCMJ, art. 15, a "minor offense" and under the TMCC a "disciplinary infraction" or military "misdemeanor."

"See MCM, 1951, para. 128b.

is not a bar to a later trial for the same offense. The TMCC requires, however, that any executed portion of the nonjudicial punishment be taken into account in any sentence imposed by court-martial.<sup>58</sup>

#### H. SUMMARY

Thus, it may be seen that in both systems the basic prerequisites for the imposition of nonjudicial punishment are the same, and, aside from some formal distinctions in wording, the misconduct properly dealt with by nonjudicial punishment is similar. In the Turkish system, however, there is a clear-cut distinction between misconduct that may be punished nonjudicially and that which *must* be referred to court-martial. In addition, the United States system permits more flexible control by a commanding officer over his subordinate commanders' authority to impose nonjudicial punishment. We shall now examine what punishments may be imposed in each system.

### V. PUNISHMENTS

#### A. TYPES AND NATURE OF NONJUDICIAL PUNISHMENTS IN THE UNITED STATES

There are nine types of punishment that may be imposed under Article 15, UCMJ. They are:

- (1) Admonition and reprimand;
- (2) Restriction;
- (3) Arrest in quarters;
- (4) Correctional custody;
- (5) Confinement on bread and water or diminished rations;
- (6) Extra duties;
- (7) Reduction in grade;
- (8) Forfeiture of pay;
- (9) Detention of pay.

The nature of each of these punishments is as follows:

##### 1. *Admonition and reprimand.*

An "admonition or reprimand" is a rebuke designed to deter repetition of the misconduct and to advise the individual of the consequences that may flow from a recurrence of that misconduct. Commanding officers may give admonitions or reprimands either as an administrative, non-punitive measure or as nonjudicial punishment.<sup>59</sup> When an admonition

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<sup>58</sup> TMCC, art. 180 (1930).

<sup>59</sup> A.R. 22-15, para. 5.

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or reprimand is imposed under Article 15, however, it should clearly indicate that it is imposed as a punishment under that article. In the case of officers and warrant officers, such punishment must be administered in writing.<sup>60</sup>

### 2. *Restriction.*

The punishment of restriction is the least severe form of deprivation of liberty. It is a moral rather than a physical restraint—an order to the individual not to depart from certain specified limits. The severity of the punishment depends upon both its duration and the relative narrowness of the limits. This punishment may include a suspension from duty, if so specified, and if the individual is suspended from duty he may not exercise any military command functions.<sup>61</sup> The individual may be required to report to a designated place at specified times, if that is considered reasonably necessary to ensure that the punishment is being properly executed.<sup>62</sup>

### 3. *Arrest in quarters.*

This punishment may only be imposed upon officers, and only by a general or flag officer in command or a general court-martial convening authority.<sup>63</sup> The officer incurring the punishment is ordered to remain in his quarters (or broader limits as specified) for a stated period of time. While undergoing such punishment he may not be required to perform any duties involving the exercise of command. If the officer who imposed the punishment, or any superior thereto who has knowledge of the punishment imposed, requires the officer to perform such duties, that automatically terminates the punishment.<sup>64</sup>

### 4. *Correctional custody.*

This is a physical restraint in “austere” surroundings “conducive to rigorous and purposeful correction.” It is not regarded as criminal “confinement” however, since its primary purpose is correction, not punishment. Consequently, persons in correctional custody will be segregated from those who are awaiting trial or held in confinement pursuant to trial by court-martial. Normally, the individual in correctional custody will work and train with his unit during duty hours, but when not doing this, he may be required to perform extra duties, including fatigue

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<sup>60</sup> MCM, 1951, para 131c(1).

<sup>61</sup> See AR 22–15, para. 8a.

<sup>62</sup> See MCM, 1951, para. 131c(2).

<sup>63</sup> See UCMJ, art. 15(b)(1)(B)(i).

<sup>64</sup> See MCM, 1951, para. 131c(3); AR 22–15, para. 8b.

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duties or hard labor.<sup>65</sup> For short periods (7 days or under) this punishment will normally be served at battalion or separate company levels, if adequate facilities exist there. For longer periods, the punishment will normally be served at installation level in facilities contiguous to a stockade, unless this is impracticable under the circumstances.<sup>66</sup>

There are certain general limitations on the imposition of this punishment; it may not be imposed upon officers or on female enlisted personnel.<sup>67</sup> Nor may it be imposed upon noncommissioned officers in the grade of E-4 or higher, if they would remain in such grade while undergoing the punishment.<sup>68</sup> Further, in the Army, no subordinate commander may impose this punishment unless he has been granted such authority by a general officer in command, or a general court-martial convening authority.<sup>69</sup>

### 5. *Confinement on bread and water or diminished rations.*

This punishment involves confinement in a place where the individual may communicate only with authorized personnel.<sup>70</sup> It may not be imposed upon officers, and may only be imposed upon persons attached to or embarked in a vessel.<sup>71</sup> The diminished rations will not be solely bread and water unless that is *specifically* imposed, and unless a medical officer first certifies that such punishment will cause no serious injury to the health of the offender.<sup>72</sup> Like correctional custody, this punishment may not be imposed on female enlisted personnel, or on noncommissioned officers who would be serving in grade E-4 or higher while undergoing such punishment.<sup>73</sup>

### 6. *Extra duties.*

This punishment, too, may not be imposed upon officers. It consists of the required performance of duties in addition to those normally performed.<sup>74</sup> It may include fatigue duties or any other military duty, and may be required to be performed at any time and for any length of time, within the duration of the punishment. This punishment may not, how-

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<sup>65</sup> See AR 22-15, para. 8c(2)(b)-(g).

<sup>66</sup> See DEPUTY CHIEF OF STAFF FOR PERSONNEL, HQ. DEP'T OF ARMY, ARMY PERSONNEL LETTER No. 2-63, at 8-9 (Feb. 1963).

<sup>67</sup> See UCMJ, art. 15(b)(1); AR 22-15, para. 7a.

<sup>68</sup> AR 22-15, para. 7a.

<sup>69</sup> *Ibid.*

<sup>70</sup> MCM, 1951, para. 131c(5).

<sup>71</sup> UCMJ, art. 15(b)(2)(A).

<sup>72</sup> MCM, 1951, para. 131c(2).

<sup>73</sup> AR 22-15, para. 7a.

<sup>74</sup> MCM, 1951, para. 131c(6).

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ever, include punishment that is cruel or unusual, or is not sanctioned by the customs of the service, or is required to be done in an unnecessarily ridiculous or degrading manner.<sup>75</sup> Nor may it involve the performance of a duty intended as an honor, or involve the use of the individual as a personal servant, or (if imposed on a noncommissioned officer or specialist) involve a duty that demeans the individual's grade (labor or duties not customarily performed by personnel of the grade of noncommissioned officer or specialist is an example of duties which demean such individual's grade).<sup>76</sup>

### 7. *Reduction in grade.*

This punishment may not be imposed upon officers. It is one of the most severe forms of nonjudicial punishment. It involves a reduction in grade, is executed and takes effect when imposed, and the individual's date of rank in such reduced grade runs from that date.<sup>77</sup> The commanding officer has authority to reduce an enlisted man from any grade to which that commander has promotion authority.<sup>78</sup> Generally, company commanders have authority to promote enlisted men to grade E-4, while promotions to grades E-5 through E-9 may be made (under existing regulations) by the commander of a regiment, battle group, separate or detached battalion, or any similar unit authorized a commander in grade of Lieutenant Colonel or higher, and commanded by a field grade officer.<sup>79</sup> The authority to impose a reduction as nonjudicial punishment for misconduct should be clearly distinguished from authority to impose an *administrative* reduction—which may only be imposed for *inefficiency*.<sup>80</sup>

### 8. *Forfeiture of pay.*

This punishment may be imposed on all military personnel. It is a permanent loss of entitlement to pay, which "takes effect" when imposed, but is considered "unexecuted" until collected.<sup>81</sup> The punishment may not extend to any pay accrued before the date of its imposition, and applies only to basic pay plus sea or foreign duty pay; it does not apply to any special pay or allowances, or to any amount the individual is required by law to contribute toward the support of his dependents.<sup>82</sup> With respect to the latter point, even when the punishment is imposed on an individual who is not required by law to con-

<sup>75</sup> AR 22-15, para. 8d.

<sup>76</sup> *Ibid.*

<sup>77</sup> See MCM, 1951, para. 131b(7); AR 22-15, para. 8a.

<sup>78</sup> See UCMJ, art. 15(b)(2)(D), (H)(iv).

<sup>79</sup> See ARMY REGS. No. 624-200, para. 3 (3 July 1962).

<sup>80</sup> See U.S. DEPT OF ARMY, PAM. No. 27-101-113 (62 JALS 113/14) (19 Dec. 62).

<sup>81</sup> See MCM, 1951, para. 134; AR 22-15, para. 10.

<sup>82</sup> See MCM, 1951, para. 131c(8); AR 22-15, para. 8f.

tribute such an amount to the support of his dependents, the commanding officer imposing the punishment must consider the effect of the punishment on the offender's responsibility for the care of his dependent. If a forfeiture is combined with the punishment of reduction in grade, regardless whether the reduction is suspended, the amount subject to forfeiture is the maximum imposable for such reduced grade.<sup>84</sup>

### 9. *Detention of pay.*

Unlike forfeitures, this punishment involves only a *temporary* withholding of a specific amount of pay. The period during which this amount is withheld (detained) may not exceed one year, or the individual's current term of enlistment, whichever is less. With respect to such matters as effective date, retroactivity, persons subject to the punishment, and "pay" subject to detention, the same rules apply as in the case of forfeitures, discussed above.<sup>85</sup>

## B. *TYPES AND NATURE OF NONJUDICIAL PUNISHMENTS IN TURKEY*

There are eight types of nonjudicial punishments that may be imposed under the TMCC. They are:

- (1) Reprimand ;
- (2) Severe reprimand ;
- (3) Forfeiture of pay ;
- (4) Restriction ;
- (5) Arrest in quarters ;
- (6) Extra duty ;
- (7) Arrest room ;
- (8) Confinement on bread and water.

These may be elaborated as follows:

### 1. *Reprimand.*

Under the TMCC the punishment of reprimand may be imposed upon all military personnel.<sup>86</sup> It may be imposed either in writing or orally. Administration of a reprimand as punishment upon commissioned officers and commissioned warrant officers must take place either without any observer or, at most, one officer superior to the offender,

<sup>83</sup> AR 22-15, para. 8f.

<sup>84</sup> MCM, 1951, para. 131c(8) ; AR 22-15, para. 8f(3).

<sup>85</sup> MCM, 1951, para. 131c(9) ; AR 22-15, para. 8f.

<sup>86</sup> TMCC 1930, art. 165.

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besides the commanding officer.<sup>87</sup> This punishment is usually imposed upon commissioned officers and commissioned warrant officers for slight disciplinary infractions.

### 2. *Severe reprimand.*

This punishment may also be imposed upon all military personnel of the Turkish Armed Forces. Imposition of this punishment may either be written or oral as in the case of reprimand. There are, however, different forms of transmission to different personnel. Severe reprimand as a punishment must be transmitted to commissioned warrant officers and acting noncommissioned officers in the presence of their superior commissioned warrant officers; and it must be transmitted to privates in the presence of at least three other privates from the offender's unit.<sup>88</sup> This punishment, in practice, is imposed only upon commissioned warrant officers, acting noncommissioned officers, and privates, but seldom upon commissioned officers.

Although there is only one kind of reprimand in the United States system, there are two kinds of reprimand in the Turkish system. In both systems, commanding officers have authority to give reprimand either as an administrative, nonpunitive measure or as nonjudicial punishment. In the Turkish system, however, admonition is not a form of nonjudicial punishment; it is given only administratively.

### 3. *Forfeiture of pay.*

Under the TMCC forfeiture of pay may be imposed upon any military personnel on the payroll.<sup>89</sup> This punishment involves a permanent loss of entitlement to the pay forfeited. When imposed by a commanding general, a maximum of one-fourth of *all* the offender's pay (basic and other) may be forfeited for not exceeding one month. In the Turkish Armed Forces, privates and acting noncommissioned officers may not be punished by forfeiture of pay since they are not pay grades.

It should be clearly noted that the Turkish system does *not* contain the punishment of *detention* of pay. It seems doubtful that this punishment is an effective form of punishment in the United States system, because the offender knows that his money will be paid one day, and he will probably procure the same amount of money in other ways, such as borrowing at high interest rates. If the purpose in temporarily withholding pay is to cause difficulty to the offender in living on reduced pay, it is questionable whether, in practice, this purpose of the punish-

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<sup>87</sup> TMCC 1930, art. 185-1.

<sup>88</sup> TMCC 1930, art. 185-2(a,b,c)

<sup>89</sup> TMCC 1930, art. 165-A(2).

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ment will be accomplished, except perhaps, in an isolated outpost where no other source of funds is available.

### 4. *Restriction*.<sup>90</sup>

This punishment is the least severe form of deprivation of liberty. It may be imposed upon all military personnel *except commissioned officers*.<sup>91</sup> This punishment is no different in nature than the restriction imposed under Article 15, UCMJ. A person undergoing restriction may be required to report to a designated place at specific times if it is considered reasonably necessary to insure that the punishment is being properly executed. A person in restriction may also be required to perform military duty.

### 5. *Arrest in quarters*.<sup>92</sup>

Arrest in quarters is the least severe form of deprivation of liberty imposed upon officers. It may only be imposed upon officers. In Turkey, the offender who is undergoing this punishment is *not* relieved of any of his regular duties. After their daily duty is finished, officers in arrest may not leave the post.<sup>93</sup> They must live in assigned quarters thereon.<sup>94</sup> They may perform duties involving the exercise of command, but they cannot have any visitors except those required in the performance of their duties.<sup>95</sup> For example, a member of the offender's family may not come to the post to visit him. This punishment is considered one of the most appropriate punishments for a junior officer. Since the officer must continue to perform his duties while being punished, it may be seen that the Turkish punishment of arrest in quarters is most similar to an American punishment of *restriction* to the post without suspension from duty (which, however, under Article 15, UCMJ, might be imposed on both officers and enlisted personnel). Turkish arrest in quarters would be more severe than this, however, since Turkish posts are closed to the public, and the officer could not, therefore, be visited by his family without official permission. In contrast, the American punishment of arrest in quarters somewhat resembles the Turkish arrest in quarters in that both may only be imposed on officers: the American form of *this* punishment, however, is the more severe since the officer would normally be suspended from duty and confined strictly to his quarters.

<sup>90</sup> The term "restriction" is used in place of the term "Izinsizlik "

<sup>91</sup> TMCC 1930, art. 165 B-II, C-III.

<sup>92</sup> The term "arrest in quarters" is used in place of the term "gozhapsi."

<sup>93</sup> In Turkey posts are closed to the public. Usually family living quarters are not on the post.

<sup>94</sup> While undergoing this punishment, the officer-offender has the freedom of the post, but normally there are no shopping or recreational facilities thereon

<sup>95</sup> TMCC 1930, art. 24-A.

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### 6. *Extra duties.*<sup>96</sup>

Extra duties may be imposed upon privates and corporals second class.<sup>97</sup> This punishment involves the performance of duties in addition to those normally assigned to the person undergoing the punishment. Only military training and normal military duty may be imposed as extra-duty punishment; fatigue duties may not be imposed.<sup>98</sup> This contrasts with Article 15, UCMJ, under which *all* military duties including fatigue duties may be imposed as extra duty. In the Turkish Armed Forces, this is a punishment which is usually imposed only upon privates.

### 7. *Arrest room.*

Under the *Turkish Military Criminal Code*, “arrest room” may be imposed upon all military personnel,<sup>99</sup> but there are differences in the manner of imposition of this punishment upon commissioned officers as distinguished from other military personnel. This punishment is a restraint of the offender during both duty and nonduty hours. “Arrest room” is executed in rooms other than military jails but which are designated solely for the execution of disciplinary punishment. A commissioned officer who is undergoing “arrest room” must live in a designated room by himself, and may not leave the room. Such officers are relieved of all their military duties. However, “arrest room” does not take place under guard, for commissioned officers.<sup>100</sup> In contrast, personnel other than commissioned officers serve their punishment of “arrest room” in rooms where they may live together with other offenders. Their rooms are guarded at all times.<sup>101</sup> Commissioned warrant officers and corporals first class are relieved of their duties while undergoing this punishment. Privates and corporals second class may be used on “heavy” military duties (hard labor). It is apparent that, when imposed on an officer, “arrest room” is more severe than the American punishment of arrest in quarters, since the offender is put in isolation—not in his own home. In addition, when imposed upon personnel other than commissioned officers, “arrest room” restricts the liberty of the offender more than the American punishment of “correctional custody,” since the offender cannot be released during normal duty hours, to work and train with his unit. Although under Article 15 correctional custody may presently be imposed only upon persons who would be serv-

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<sup>96</sup> The term “extra duty” is used in place of the term “sira harici hizmet.”

<sup>97</sup> TMCC 1930, art. 165-N.

<sup>98</sup> TMCC 1930, art. 185-C(3).

<sup>99</sup> TMCC 1930, art. 165-A,B,C.

<sup>100</sup> TMCC 1930, art. 24-B.

<sup>101</sup> TMCC 1930, art. 25-3.

ing as private soldiers (*i.e.*, in one of the three lowest grades) while undergoing such punishment, “arrest room” may be imposed upon all military personnel, including commissioned officers. However, in practice, “arrest room” is very rarely imposed upon commissioned officers. This is probably the most effective nonjudicial punishment in the Turkish system—in its restriction of liberty it greatly resembles confinement.

#### 8. *Confinement on bread and water.*

This punishment may be imposed upon all military personnel, other than commissioned officers and military students. Confinement on bread and water involves confinement in a room where the person so confined may communicate only with authorized personnel. The offender lives by himself in the room, and it is guarded at all times. The offender who is undergoing this punishment may not be given any food other than bread and water, nor may he be given cigarettes. On the 4th, 8th, and 12th days of confinement, normal rations must be given. After the 12th day, normal rations must be given every third day.<sup>102</sup> Whenever punishment on bread and water is imposed, a signed certificate of a doctor stating that in his opinion no serious injury to the health of the person to be confined will be caused by that punishment must be obtained before the punishment is executed. If the offender's health does not permit this punishment, the punishment of “arrest room” is imposed instead.<sup>103</sup> Although in the United States confinement on bread and water or diminished rations is a traditional punishment only in the Navy, in Turkey confinement on bread and water is a traditional punishment in all of the Armed Forces. In practice, however, this punishment is very rarely imposed even upon privates.

Finally, in sharp contrast to Article 15, CCMJ, there is *no* punishment of *reduction* in grade in the Turkish nonjudicial punishment system. This appears to be the case because of fundamental differences in the promotion system in the Turkish Armed Forces. Commanding officers have no promotion authority, as they have in the United States. Promotion authority is the exclusive function of promotion boards. Commanding officers are limited to making recommendations in individual service records which are considered by the boards. For this reason, the Turkish system of nonjudicial punishment is deprived of one kind of punishment that probably is one of the most severe but effective punishments in the United States nonjudicial punishment system.

<sup>102</sup> TMCC 1930, art. 26.

<sup>103</sup> TMCC 1930, art. 27.

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## C. LIMITATIONS ON PUNISHMENTS

### 1. General limitations.

In both systems, the various kinds of punishment have some similar general limitations. Punishments must not be inhumane. Flogging, marking, tattooing, and the use of irons are prohibited as being cruel and unusual punishment.

In the United States system, the President and the Secretary concerned may, by regulations, place limitations on the powers granted by Article 15, UCMJ, with respect to the kind and amount of the punishment authorized. In the Turkish system, the President and the Minister of National Defense have no similar authority. The kinds and amounts of the punishments are all expressly set forth in the TMCC and can only be revised by law.

Under Article 15, UCMJ, in addition to or in lieu of admonition or reprimand, one *or more* of the various listed kinds of punishments may be imposed for the same offense upon offenders.<sup>104</sup> Under the TMCC, commanding officers have no authority to combine punishments for the same offense. They may impose only one of the kinds of punishment authorized.

### 2. Authorized maximum punishments under Article 15, UCMJ.

Upon commissioned and warrant officers: The following chart indicates the maximum nonjudicial punishments that may be imposed on commissioned officers and warrant officers:

CHART 1

	By All Commanders	By GCM Authority or General Officer in Command
Restriction, with or without suspension from duty .....	30 days	60 days
Arrest in quarters .....	(none)	30 days
Forfeiture of pay .....	(none)	½ of one month's pay for 2 months (30 days' pay)
Detention of pay .....	(none)	½ of one month's pay for 3 months (45 days' pay)

Chart 2 shows the maximum nonjudicial punishments that may be imposed on enlisted personnel. It will be noted that when such punish-

<sup>104</sup>This has been limited by Army regulations, however, which provide, in effect, that no two punishments within any one *category* (liberty, or pay) may be combined, except restriction and extra duties, which may be combined to run in any manner for the maximum duration for extra duties. See AR 22-15, para. 7c.

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inent is imposed on *enlisted* personnel, the higher category of officer *imposing* the punishment gives rise to no difference in the *kinds* of punishment that may be imposed—only the *amounts* thereof,

CHART 2

	By All Commanders	By Commander in Grade of Major or Higher
Restriction .....	14 days	60 days
Extra duties .....	14 days	45 days
Correctional custody .....	7 days	30 days
Confinement on bread and water or diminished rations .....	3 days	3 days
Forfeiture of pay .....	7 day's pay	½ of one month's pay for 2 months (30 days' pay)
Detention of pay .....	14 days' pay	½ of 1 month's pay for 3 months (45 days' pay)
Reduction in grade .....	One grade <sup>105</sup>	E-4 or below, one or more grades; E-5 or above, one grade

### 3. Authorized maximum Punishments under the Turkish Military Criminal Code.

The chart<sup>106</sup> included in Article 171, TMCC, indicates the kinds and amounts of punishments that commanding officers may impose, in accordance with their ranks.

Examination of this chart will disclose that all commanding officers have the authority to impose the punishment of reprimand and severe reprimand upon all subordinates. Commanders in the rank of captain or below may impose *light* nonjudicial punishment. Commissioned warrant officers may impose punishments, as indicated on the chart, other than reprimand and severe reprimand only if they command a separate unit. The lowest ranking commander having authority to impose the punishment of "arrest room" is the second lieutenant, and he may impose no more than three days of such punishment. Generally, increased authority to impose punishment has been given to the commanders of separate units up to the rank of captain. A commander in grade of captain—the rank of a company commander—may impose all kinds of nonjudicial punishment, except forfeiture of pay.

<sup>105</sup> It should be noted that commanding officers may only reduce enlisted personnel from grades to which they have "promotion" authority. See UCMJ, art. 15(b)(2)(D). Company commanders have such authority only up to grade E-4. See ARMY REGS. NO. 624-200, para. 3 (3 July 1962). Consequently, such commanding officers may only reduce enlisted personnel in grade E-4 or below.

<sup>106</sup> See chart 3, following.

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## CHART 3 107

Rank of commander imposing punishment	Types of punishment that may be imposed <sup>c</sup>							Confinement on bread and water <sup>e</sup>
	Reprimand and severe reprimand <sup>d</sup>	Forfeiture of pay <sup>e</sup>	Restrictions <sup>f</sup>	Extra duties <sup>g</sup> -%	Arrest in quarters <sup>h</sup>	Arrest room		
						Comm. officers	Personnel	
Corporal 2d Class <sup>a</sup>	Yes	No	1 Day <sup>i</sup>	1 repetition <sup>i</sup>	No	No	No	No
Corporal 1st Class, <sup>a</sup> CWO	Yes	No	1 Day <sup>i</sup>	1 repetition <sup>i</sup>	No	No	1 Day <sup>i</sup>	No
Second Lt, First Lt	Yes	No	3 Days	3 repetitions	No	No	3 Days <sup>i</sup>	No
Captain	Yes	No	7 Days	No limit	2 Days	2 Days	7 Days	3 Days
Major	Yes	1/10	14 Days	No limit	7 Days	4 Days	14 Days	5 Days
Lt Colonel, Colonel	Yes	1/8	21 Days	No limit	14 Days	7 Days	21 Days	7 Days
Brigadier and Major General	Yes	1/4	28 Days	No limit	21 Days	14 Days	28 Days	14 Days
Lieutenant General <sup>b</sup>	Yes	1/4	28 Days	No limit	28 Days	28 Days	28 Days	21 Days
and Above								

<sup>107</sup> The following notes amplify the entries contained on chart 3, above:

- <sup>a</sup> Corporals, 2d class and 1st class, are the two grades authorized for acting noncommissioned officers.
- <sup>b</sup> Includes generals, marshals, and the Minister of National Defense.
- <sup>c</sup> Until 1961, commissioned warrant officers, together with acting noncommissioned officers, and privates, were referred to collectively as one category of personnel known as "crat." With the enactment of the Turkish Armed Forces Internal Law (Law No. 211, effective 27 May 1961), commissioned warrant officers were established as a separate category of personnel to be known as "asubay." This change, as well as the creation of the new category of Reserve officer teacher in 1961, necessitated compensating changes, both technical and substantive, in the TMCC. It is understood that such legislation is being prepared. The foregoing table reflects the provisions of the TMCC currently in effect. However, it is believed that the provisions of the TMCC referring to commissioned officers should be regarded as applicable to Reserve officer teachers, and those referring to "crat" to apply to commissioned warrant officers.
- <sup>d</sup> The only nonjudicial punishment imposable upon general officers is reprimand. In addition, brigadier and major generals may impose only reprimand upon colonels, and colonels may impose only reprimand upon lieutenant colonels.
- <sup>e</sup> Only that fraction of one month's pay indicated above is subject to forfeiture.
- <sup>f</sup> Extra duties are imposed as a specific number of repetitions of some particular type of military training or normal military duty, not including fatigue duty. No maximum limitation on the number of repetitions has been fixed in the case of commanders in the grade of captain or above. Such commanders may impose as much extra duty as they deem necessary.
- <sup>g</sup> Restriction, extra duties, and confinement on bread and water may be imposed only on commissioned warrant officers (but see note c, above) acting noncommissioned officers and privates, except that restriction may also be imposed upon military students. Military students, with this exception, are otherwise generally treated like commissioned officers.
- <sup>h</sup> Arrest in quarters may be imposed only upon commissioned officers. (But see note c, above, as to Reserve officer teachers.)
- <sup>i</sup> Restriction and extra duties may be imposed by commissioned warrant officers and acting noncommissioned officers only when they command a separate unit. Arrest room is imposable by lieutenants, commissioned warrant officers, and corporals, 1st class, only when they command a separate unit.

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Turkish commanding officers who have the rank of captain or higher have the authority to give the punishment of extra duty to the extent they deem necessary. *The maximum limit has not been fixed* for this punishment. Although under Article 15, UCMJ, the punishment of extra duties is imposed in terms of days (for example, 3 days' extra duty), under the TMCC it is imposed as numbered repetitions of a certain duty. As has been explained before, in Turkey the punishment of extra duties comprises only military training and normal military duties. (For example, the offender will mount guard 10 times more than his regular turn.) The time is fixed by the commanding officer. The particular method used does not seem significant, since in any case it is necessary to define some limit, whether in days or in numbered repetitions.

A major is the lowest ranking officer who has the authority to impose the punishment of forfeiture of pay. He may impose forfeiture of one-tenth of one month's pay. The maximum forfeiture is one-fourth of one month's pay which may only be imposed by a commanding general. Thus, the maximum limits for this punishment are much less than those authorized by Article 15, UCMJ. These limitations reflect differences in the living standards and pay of the personnel of the two countries. On the other hand, when this punishment is imposed upon an offender who is married, not only the offender is punished, but at the same time his family is also punished. Although commanding officers have to consider these situations before imposing the punishment—and are required to impose the most appropriate punishment—unfortunately commanders can be wrong in their choice. For this reason, the author believes that the maximum limit for this punishment should not be high in spite of its effectiveness. It must be in accordance with the living standard and pay of the military personnel concerned. So far as the Turkish Armed Forces are concerned, the percentage of forfeiture of pay presently authorized under the TMCC seems proper.

In the Turkish system, the maximum limitation for all punishments is 28 days, except extra duties and confinement on bread and water for which the limit is 21 days. The most important differences between the Turkish and American systems in respect to maximum limitations on punishments are those relating to the punishment of restriction and to confinement on bread and water (or diminished rations). Although under Article 15, UCMJ, a commander may impose 60 days' restriction but only 2 days' confinement on bread and water (or diminished rations), under the TMCC he may impose only 28 days' restriction but 21 days' confinement on bread and water. The author believes that the maximum limit of confinement on bread and water should be

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lessened in the Turkish system. However, this punishment is only rarely imposed in Turkey, and even then the maximum is almost never imposed. The apparent reluctance to use this presently authorized punishment may indicate general disapproval of its severity.

### VI. EFFECTIVE DATE AND EXECUTION OF PUNISHMENTS A. UNITED STATES

Under Article 15, UCRIJ, "the punishments of reduction, forfeiture of pay, and detention of pay, if unsuspended, take effect on the date the commanding officer imposes the punishment."<sup>108</sup>

The date of imposition of nonjudicial punishment, if the proceedings are conducted in writing, is the date Section III of DA Form 2627-1 is signed by the officer who imposed the punishment, and, if oral proceedings are held, the date of imposition of punishment as recorded in the Summarized Record of proceedings (DA Form 2627). Other punishments, if unsuspended, will take effect and be carried into execution on the date the commanding officer imposes the punishment unless otherwise prescribed by that officer or by superior authority. If the member to be punished is then undergoing any of the punishments involving deprivation of liberty and the commanding officer wishes to impose that kind of punishment, he may prescribe that the punishment which he imposes will begin to run on a date subsequent to the termination of the first punishment. The punishment of reduction, unsuspended, becomes executed at the time it is imposed.<sup>109</sup>

### B. TURKEY

Under the TMCC the punishment begins to run after it is transmitted to the offender.<sup>110</sup> Transmission may be written or oral. When necessary, however, the commanding officer who imposes the punishment may order either that the punishment will be executed at interrupted periods or that the execution will be delayed. For example, he may order that 10 days' restriction will begin to run next week or that it will be executed on weekends only.

Also, in the Turkish system, when the offender has completed his punishment, he reports that fact to the commander who imposed the punishment. If the commander is out of the garrison, the report is made to the next higher commander. The commanding officer counsels the offender, and admonishes him to conduct himself in the future so as not again to become the subject of nonjudicial punishment.<sup>111</sup> This practice is in accord with the correctional nature of nonjudicial punishment.

<sup>108</sup> MCM, 1951, para. 131e.

<sup>109</sup> AR 22-15, para. 10.

<sup>110</sup> TMCC 1930, art. 181.

<sup>111</sup> See Turkish Armed Forces Internal Service Regulation 1962, art. 56.

## VII. RIGHT TO DEMAND TRIAL IN LIEU OF NONJUDICIAL PUNISHMENT

### A. UNITED STATES

Except in the case of a person attached to or embarked in a vessel, punishment may not be imposed under Article 15 upon any member of the armed forces who has, before imposition of such punishment, demanded trial by court-martial in lieu of such punishment. A person is attached to or embarked in a vessel if, at the time the nonjudicial punishment is imposed, he is assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body. If the member is attached to or embarked in a vessel, he does not have the right to demand trial by court-martial in lieu of punishment under this article unless this right shall have been specifically granted by regulations of the Secretary concerned.”

Army personnel attached to or embarked in a vessel may not demand trial by court-martial in lieu of nonjudicial punishment. All other members of the Army may demand trial by court-martial in lieu of punishment under Article 15. The commanding officer who intends to impose the punishment will notify the member concerned of that intent [See para. 14a, below] and, if the right to demand trial by court-martial exists, will afford the member a reasonable period in which to decide whether or not he will demand trial and direct him to state either that he does, or does not, demand trial within that period. . . . In deciding whether he wishes to elect trial by court-martial, the member is not entitled to be informed as to the type or amount of punishment he will be given if he does not demand trial. However, upon his request, he will be informed of the maximum punishment which may be imposed under Article 15 by the commanding officer who is to impose the punishment and of the maximum punishment that can be adjudged by court-martial upon conviction of the offense or offenses involved. If the member demands trial by court-martial as to any offense involved, further action will not be taken to impose nonjudicial punishment as to that offense.<sup>113</sup>

### B. TURKEY

The most important difference between the American and Turkish systems is in this area. In the Turkish system, offenders have no right to demand trial. Offenders may not be tried by court-martial for disciplinary infractions because these acts are not contained in any article of criminal laws. In cases involving military “*misdemeanors*,” however, commanding officers have authority to impose nonjudicial punishment or to send the case to trial by court-martial.<sup>114</sup> The commanding officer must permit the offender to be heard before making

<sup>112</sup> MCM. 1951, para. 132

<sup>113</sup> AR 22-15, para. 11.

<sup>114</sup> The commander *must* do one or the other. See note 47, *supra*, and accompanying text.

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a decision on this question.<sup>115</sup> In any case, the offender may request the commander to interview certain witnesses or to obtain statements from witnesses. Such a request should be granted. After these actions, the commander makes a decision.

In this area, more power has been given to commanders of the Turkish Armed Forces than to commanders in the United States forces. The right to demand trial by court-martial is a valuable check on the abusive use of nonjudicial punishment by any commanding officer. Failure to provide such a right may fairly be characterized as a deficiency in the Turkish nonjudicial punishment system.

### VIII. SUSPENSION, MITIGATION, REMISSION, AND SETTING ASIDE

#### A. UNITED STATES

Under Article 15(d), UCMJ,

The officer who imposes the punishment or his successor in command may, at any time, remit or mitigate any part or amount of the unexecuted portion of the punishment imposed, and he may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected. He may also mitigate reduction in grade, whether executed or unexecuted, to forfeiture or detention of pay. In addition, he may, at any time, suspend probationally any part or amount of the unexecuted portion of the punishment imposed and may suspend probationally a reduction in grade or a forfeiture, whether or not executed. An uncollected forfeiture of pay shall be considered as unexecuted?"

Mitigation means a reduction in either the quantity or the quality of a punishment, its general nature remaining the same. For example, if a punishment of correctional custody for 30 days is reduced to correctional custody for 20 days or to restriction for 30 days, each action would constitute mitigation; the first lessening the quantity and the second lessening the quality, with both mitigated punishments remaining of the same general nature as correctional custody, that is, a deprivation of liberty. Likewise, a forfeiture of pay may be mitigated to a lesser forfeiture or to a detention of the same or a lesser amount of pay, and, under Article 15(d), a reduction in pay grade may be mitigated to forfeiture or detention of pay?"

Remission . . . is an action whereby any portion of the unexecuted punishment is cancelled.<sup>118</sup>

[A] "successor in command" is the commanding officer who has succeeded to the command of the officer who imposed the punishment, or under whose dele-

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<sup>115</sup> TMCC 1930, art. 175.

<sup>116</sup> MCM, 1951, para. 134.

<sup>117</sup> AR 22-15, para. 17.

<sup>118</sup> AR 22-45, para. 18.

gated power the punishment was imposed, if the person punished is still of that command. If the person punished ceases to be of that command, the "successor in command" is that present commanding officer of the offender who can impose punishment of the kind involved in the case. When there has been a succession in command with respect to the person punished, only the successor in command may take action with respect to suspension, mitigation, remission, and setting aside.<sup>119</sup>

### B. TURKEY

Although suspension of punishment is possible in the Turkish *court-martial* system, there is no such provision for the suspension of *non-judicial* punishment. Nonjudicial punishment is imposed without suspension, and it may not be suspended even by superior authorities. Under the Turkish Civilian and Military Criminal Codes, only sentences imposed by a court may be suspended, and only by the court that imposed them.

The purpose of suspending punishment is aligned with the primary purpose of nonjudicial punishment to *correct* the offender—suspension is an effective incentive (especially to the first offender) to correct and rehabilitate himself. This valuable device is consistent with the purpose of nonjudicial punishment in Turkey, and its adoption would increase the efficiency of the Turkish system.

Under the TMCC, a commanding officer may not set aside, mitigate, or remit any nonjudicial punishment he has imposed, once the punishment has been transmitted to the offender.<sup>120</sup> No one has power to remit punishment. Only a superior authority has power to set aside or mitigate punishments. Upon appeal the superior authority must first determine whether the offense committed was a military "misdemeanor" or "disciplinary infraction" properly punishable by the nonjudicial system. If he finds the act not so punishable, he must set the punishment aside and restore the offender. If he finds the act so punishable, he may affirm the action of the commanding officer or mitigate the punishment to a more appropriate level.

It might be said that the commander who has the authority to impose punishment must also have the authority to set aside, suspend, mitigate, or remit such punishments as is the case in the United States system. But, it is necessary to establish rules which assure that nonjudicial punishments are not misused by commanders. In the Turkish system, the commander's knowledge that he may not later reduce the punishment gives him an added incentive to exercise restraint—to impose the most appropriate and just punishment upon the offender the first

<sup>119</sup> AR 22-15, para. 15

<sup>120</sup> TMCC 1930. art 181

## TURKISH NONJUDICIAL PUNISHMENT

time. In addition, the commander is aware that if he imposes an unjust punishment, the superior authority will learn of it when the appeal reaches him. As will be explained below, if the commander concludes that his punishment was unjust, he too has a right to send the case to the superior commander. In this area, the Turkish system effectively maintains the power of superior commanders, assures the imposition of appropriate and adequate punishments by commanding officers, and prevents injustice to individuals.

### IX. RIGHT TO APPEAL

#### A. *NORMAL APPEALS*

##### 1. *Procedure.*

In both countries' systems, a person punished under the authority of Article 15, UCMJ, or the TMCC, who considers his punishment unjust or disproportionate to the offense may appeal to the next authority.

Under Article 15, UCMJ, the appeal is forwarded in command channels through the officer who imposed the punishment. He may suspend, mitigate, remit, or set aside the punishment, and, if he does so as to any part thereof, he must notify the appellant, requesting the appellant to state whether, in view of such action, he wishes to withdraw the appeal. Unless the appeal is then voluntarily withdrawn, it must be promptly forwarded to the appropriate superior authority.<sup>121</sup>

An appeal under Article 15 will be acted upon by the authority next superior to the officer who imposed the punishment if the person punished is still of the command of that officer at the time he appeals, but if the punishment has been imposed under a delegation of the superior's power to impose nonjudicial punishment [see para. 128, MCM, 1951] the appeal will be acted upon by the authority next superior to him. If, however, at the time he appeals from the punishment, the person punished is no longer of the command of the officer who imposed the punishment, the appeal shall be acted upon by the authority next superior to that present commanding officer of the offender who can impose punishment of the kind involved in the appeal.<sup>122</sup>

Under the TMCC, the individual appeals directly to the next superior authority without proceeding through channels.<sup>123</sup> For example, an offender may appeal directly to the battalion commander from punishment imposed by his company commander. The purpose of the direct appeal is to assure immediate examination and judgment by the superior commander. Such a direct appeal is also sound, under the

<sup>121</sup> See AR 22-15, paras. 22, 23.

<sup>122</sup> AR 22-15, para. 21.

<sup>123</sup> TMCC 1930, art. 188-1.

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Turkish system, because the officer who imposed the punishment has no power to reduce it.

### 2. *Who may appeal.*

Under Article 15, UCMJ, only the offender has a right to appeal. Under the TMCC, however, the case may also be appealed directly to the next superior authority by the commanding officer who imposes the punishment<sup>124</sup> or one who is the superior of the offender.<sup>125</sup> A commander who later concludes that the punishment was inappropriate and unjust may refer it to a superior Commander for the purpose of either setting aside or mitigating that punishment. Even though the TMCC states that the “offender’s superiors” also have the right to appeal the case to the next superior authority, neither the Code nor regulations mention which of the offender’s superiors have the right to appeal. In accordance with the terms of the Code, probably *any* person who is the superior of an offender and who concludes that the punishment imposed was unjust has the right to appeal. This rule also makes commanders careful with respect to imposing nonjudicial punishment.

### 3. *Who is the “next superior”?*

In both systems, the authority “next superior” to a particular commanding officer is considered to be the authority normally next superior in the chain of command. In addition, in the United States system it is provided that for purposes of appeal from Article 15 punishment, the “next superior” may be “such other authority as may be designated as being next superior for the purposes of Article 15 by higher authority.”<sup>126</sup>

### 4. *Stay of execution.*

In both systems, the person punished may, while the appeal is in process, be required to undergo the punishment imposed. Article 183-3, TMCC, states that the appeal does not prevent the execution of punishment, and Article 188-5 provides that appeals must immediately be examined and decided by superior commanders. In the United States, similar provisions may be found in Article 15(e), UCMJ.

### 5. *Time requirements.*

In the United States system an appeal not made within a “reasonable time” may be rejected by the superior authority acting on the

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<sup>124</sup> TMCC 1930, art. 190.

<sup>125</sup> TMCC 1930, art. 188

<sup>126</sup> AR 22-15, para. 21.

## TURKISH NONJUDICIAL PUNISHMENT

appeal. Generally, 15 days after the imposition of punishment is considered to be a “reasonable time,” absent extraordinary *circumstances*.<sup>127</sup>

Under the TMCC, the offender may appeal to the next superior authority after one night from the day when the punishment was transmitted to him.<sup>128</sup> There is no explanation in the Code and regulations as to why this rule was established. Normally, this is the time when execution of the punishment begins, and it provides the offender time to think about appeal. There is no definite rule about the time after which an appeal may not be made.

### 6. *Legal review.*

In both systems, appeals must be submitted in writing and may include the appellant’s reasons for regarding the punishment as unjust or disproportionate.

Before acting on an appeal from any punishment of the kind set forth in Article 15(e)(1)–(7) [the more aggravated punishments], the authority who is to act on the appeal shall refer the case to a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Marine Corps, Coast Guard, or Treasury Department for consideration and advice, and may so refer the case upon appeal from any punishment imposed under Article 15. . . . If the legal personnel of the categories mentioned above serving on his staff or otherwise available to him, he may either

(1) refer the case for consideration and advise by appropriate legal personnel of one of those categories serving on the staff of another commander, or

(2) refer the case for action to a superior authority who has appropriate legal personnel available to him for this purpose.<sup>129</sup>

In the Turkish system, the next superior commanding officer who is to act on an appeal may refer the case for consideration and advice to a military judge. In practice, a commanding officer who has any kind of court-martial jurisdiction traditionally refers such appeals to a military judge for advice.

Under Article 15, when a case is referred to a judge advocate, law specialist, or lawyer for consideration, “he is not limited to an examination of any written matter comprising the record of proceedings and may make such inquiries as he determines to be desirable.”<sup>130</sup> In this respect there is no difference between the Turkish and United States systems.

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<sup>127</sup> See MCM, 1951. para. 135; AR 22–15, para. 26.

<sup>128</sup> TMCC 1930. art. 188–2.

<sup>129</sup> MCM 1951. para. 135.

<sup>130</sup> *Ibid.*

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### 7. Powers of superior authority.

In the United States system, in acting upon an appeal, the superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under Article 15(d) by the officer who imposed the punishment or his successor in command. Thus, he may suspend, remit, mitigate, or set aside in whole or in part the punishment imposed. After having considered an appeal, the superior authority will transmit to the appellant, through channels, a written statement of his disposition of the case.<sup>131</sup>

Under the TMCC, the commanding officer who imposes the punishment has no authority to suspend, mitigate, remit, or set aside such punishment after its imposition. The next superior authority, who acts upon appeal, however, has the power to set aside or to mitigate. He must make a decision in writing. Copies of his decision will be sent to the offender's unit and to the persons who appealed.

### B. EXTRAORDINARY REVIEW

Under the United States system,

[A]ny superior authority may exercise the same powers as may be exercised by the officer who imposed the punishment or his successor in command under 134 [para. 134, MCM] and Article 15(d), whether or not an appeal has been made from the punishment.<sup>132</sup>

The term "any superior authority" has the same meaning as that given to the term "next superior authority" . . . except that it also includes any authority superior to that authority.<sup>133</sup>

Under Article 184, TMCC, any superior authority may set aside or mitigate the punishment as indicated in Article 191 of the Code, upon appeal, or upon discovery of an injustice during routine inspections of duty. The term "any superior authority" means "the next superior authority" and any authority superior to that authority. Superior authorities, however, have no power to set aside or to mitigate the punishment without inspections of duty or appeals. This rule maintains the power of the commanding officer who imposes the punishment, in his unit.

## X. CONCLUSIONS AND RECOMMENDATIONS

The foregoing comparative analysis of nonjudicial punishment under Article 15, UCMJ, and the TMCC has shown that there are similarities and dissimilarities between the two systems—some justified some not.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> AR 22-15, para. 27.

## TURKISH NONJUDICIAL PUNISHMENT

To repeat each of these comparisons at this juncture would merely be redundant. It has been established that the general theory and objectives of both systems are similar. Both are concerned with maintaining unit-discipline and with providing a speedy, fair method of dealing with lesser misconduct. In several significant respects, however, these systems of nonjudicial punishment differ. Such differences point to some improvements that could be made in the efficiency of the Turkish system. These are incorporated into the following recommendations:

(1) The offender should have the right to *demand trial* in lieu of nonjudicial punishment.

(2) A maximum limitation on the punishment of “extra duty”—which may now be imposed to the extent a commanding officer may deem necessary—should be prescribed in the Turkish code.

(3) Both the commanding officer who imposes the punishment, and the commander who acts on an appeal, should have the authority to *suspend* nonjudicial punishments imposed.

(4) All kinds of nonjudicial sanctions (rather than only the 3 most severe) should be available to the appropriate commanding officer for the nonjudicial punishment of misdemeanors indicated in Article 18, TMCC. In addition, if the offender is tried by court-martial for such an offense, the court-martial should similarly be permitted to impose the lesser kinds of nonjudicial punishments, by judicial action.

(5) Article 164(c), TMCC, which states that nonjudicial punishments may be imposed upon prisoners of war, should either be revised or abolished.

(6) The punishment of “arrest room” should not be imposed upon officers. (Correctional custody is not imposed upon officers under Article 15, UCMJ.)

(7) The present maximum limitation on the punishment of “confinement on bread and water” (21 days) should be decreased.

There are several other dissimilarities between the two systems which do not affect the efficiency of the Turkish system; therefore, no suggestion or recommendations for changes are made concerning these matters. These dissimilarities have been individually discussed in the preceding chapters and are specifically as follows:

(1) Although any commanding officer having disciplinary authority under Article 15, UCMJ, may limit or withhold the exercise by his subordinate commanders of their disciplinary authority, in the Turkish system, superior commanders have no such limiting authority.

(2) In the Turkish system, there is no punishment of “reduction in grade.”

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(3) In the Turkish system, there is no punishment of “detention of pay.”

(4) In the Turkish system, there are two kinds of “reprimand”; “admonition” is not imposed as a nonjudicial punishment.

(5) In the United States, commanders who impose nonjudicial punishment have authority to mitigate, remit, or set aside such punishments; in Turkey, commanding officers have no such authority.

(6) Although under Article 15, UCMJ, only officers or warrant officers (para. 128a, MCM) have authority to impose nonjudicial punishment, under the TMCC *all* commanders, commissioned *or acting noncommissioned officers*, have authority to impose certain forms of nonjudicial punishment.

(7) The maximum limitation on the punishment of “forfeiture of pay” in the United States is one-half of one month’s pay for two months; in Turkey, it is one-fourth of one month’s pay for one month.

(8) The maximum limitation on the punishment of “restriction” in the United States is 60 days; in Turkey, it is 28 days.

(9) In the United States system, the President and the Secretary of a military department concerned may, by regulations, place limitations on the powers granted by Article 15, UCMJ, with respect to the kind and amount of punishment that may be imposed. In Turkey, the President and Minister of National Defense have no such authority. although, under the Turkish Code, the Ministry of National Defense may impose nonjudicial punishment.

(10) There is no policy in the different services of the Turkish Armed Forces against an officer of one force imposing nonjudicial punishment on members of a different force; however, this is not permitted in the United States Army.

(11) Under Article 15, UCMJ, any appeal must be submitted through the offender’s commanding officer who imposed the punishment, while under the TMCC the offender appeals directly to the *next* superior authority without going to his commanding officer.

(12) Under Article 15, UCMJ, *only the offender* has the right to appeal whereas under the Turkish Military Criminal Code, the commanding officer who imposes the punishment, and any person who is the superior of the offender, may also appeal to the next superior authority.

## BOOK REVIEW

(Foreign Periodical)

### **Revista Espanola de Derecho Militar, Instituto Francisco de Vitoria, Seccion de Derecho Militar (Consejo Superior De Investigaciones Cientificae) \***

The main purpose of this article is to acquaint the reader with a foreign military law review of substantial merit. All too often, foreign periodicals are dismissed summarily as useful legal tools. Reliance is placed on known quantities, and standard or accepted texts are many times used exclusively. This tends both to stereotype thinking and limit exploration into the many areas of international and comparative law. Here an attempt is made to broaden the United States military lawyer's awareness of other reputable sources of information available to him and to try to point the way toward greater inquisitiveness in the field of international and comparative law. The *Revista Espanola De Derecho Militar* is significantly helpful in broadening this horizon.

Published by the Instituto Francisco de Vitoria, Military Law Section,<sup>1</sup> under the auspices of the Superior Council for Scientific Investigations, the *Revista* is dedicated to expounding various legal problems that arise in the area of military law. The scope of the *Revista* is international in that its area of inquiry is by no means limited to Spain or even the Spanish speaking nations of the world. The Institute is well known in legal circles throughout the world and has an excellent reputation for sound scholarship.

Although the articles and notes contained in these reviews cover a wide area of military law and the laws of various nations as they relate to the military, there seems to be a common thread running throughout. The editors have made a concerted effort to categorize, in an expository manner, the military tribunals, the military law and jurisdiction and the penal law of as many countries as possible. Almost

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\* In reviewing the various revistas, volumes one and eleven were unavailable and could not be reviewed at this time. All other volumes to date were reviewed.

<sup>1</sup> Address—Calk Duque de Medinaceli 4, Madrid, Spain. Two numbers or issues of this Review are published annually. Subscriptions may be obtained from the Francisco de Vitoria Institute, Military Law Section, at the following rates: annual subscription, 300 pesetas (about \$5.00); single issue, 160 pesetas (about \$2.70). In addition, judge advocate officers may borrow issues beginning with number 15 from The Judge Advocate General's School, ATTN: Publications Division, if necessary.

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all the reviews considered contained at least one article in the above-mentioned areas. Further there was a decided emphasis placed on the military laws of the Latin American nations as well as a fairly extensive coverage of the nations of Europe.

Before discussing the relative merits of the reviews generally and various articles specifically, this reviewer would like to note the breath and scope of the areas covered by the *Revista*. From an editorial point of view, the reviews appear to be fairly consistent in both their treatment of the various subjects under consideration and in the selection of the areas of inquiry. Three rather broad areas are given constant attention throughout these periodicals: military law, military tribunals, and penal law.

The accent of the military law articles is directed primarily to the scope of jurisdiction which a particular military tribunal has in any given country. Further, great emphasis is placed on the crimes committed by military persons under the jurisdiction of the various military tribunals. The treatment of the military law of the countries considered is predominantly statutory, although several of the articles do make an internal and comparative analysis of these laws. Countries covered in this area include Argentina, Israel (in two parts), Korea, Morocco, Switzerland, and the USSR.

In the field of military tribunals, the stress of the articles is in defining and setting out the court systems and their effectiveness in three different types of cases: their workings in time of peace, in time of war, and in time of martial law or a declared state of emergency. Countries treated under this heading include Belgium, Chile, Ecuador, the United Kingdom, and Venezuela.

The last major area that is emphasized in these *revistas* is penal law. This area includes the penal system of the country and tends to overlap at times into the area of military law when discussing various elements of military crimes. As in the area of military law, the articles are essentially of a statutory or textbook nature, the statutes being set out with occasional critical comment. The countries whose systems were discussed include Brazil, Chile, Columbia, Germany, Luxemburg, and Spain.

The purpose and scope of this review will be to trace the common thread of some articles and attempt to discuss their value to both the Spanish civilian and military bar as well as their value as source material for members of the United States bar, both civilian and military. Due to the great wealth of material and the time span of these reviews, the many other articles covered in this series cannot be ade-

quately covered and are therefore not included. The purpose of this review is to acquaint the reader with a foreign journal of high academic standing and point up some major areas accentuated by its editors.

Some general comments are in order. The editors of these reviews were primarily interested in setting out the various laws and systems in statute-like form; that is, in setting out the function of the systems without much comment or analysis of the practical effects these laws had on the military organization within the country under consideration. This is, of course, a different approach in law review writing than is generally found in the United States. The only apparent purpose of this style of writing is to make the law review a source book, in addition to what is normally considered its primary purpose, that of theorizing on the effects of the law and relating it to present and future situations. This reader questions the use of a law review in this manner as such information is readily obtainable from the statutory sources and treatises themselves. For the members of the Spanish military bar, there are many far more easily accessible treatises which cover these subjects in greater detail. Therefore, the use of these reviews as primary source material within Spain seems somewhat limited.

A further question arises on reading these reviews. The Spanish military community, like those of the various other European nations, has always been more advanced in the area of international and comparative systems of law than has its United States counterpart. The past history of Europe has created, of necessity, such an awareness and has required a military lawyer to possess a knowledge of military law which transcends the borders of his own nation. The very proximity of the nations of Europe has forced this awareness on the military lawyer and required that he be proficient in various legal systems. This geographic situation of the nations of Europe and, to a lesser extent, those of South America have led to fairly extensive coverage of the military laws of the various nations. With such coverage, there is further reason to question an almost textual treatment of these various systems of military tribunals, law and jurisdiction, as set out in most of these articles. If the purpose of these articles was to inform the Spanish military bar, this writer feels that they are of limited worth as an editorial project.

However, this writer does feel that these types of articles have far more usefulness to the non-European countries such as the United States and the countries of Latin America. Most of these articles, because of their textual and non-theoretical nature, are quite valuable as a starting point in obtaining a basic understanding of the military

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legal systems of the countries considered in the reviews. The simplicity of style and treatment is a definite advantage to the uninitiated and allows one to view the necessary skeleton without the sometimes confusing flesh of theory and practice. All too often in the area of international law initial misconceptions arise due to the too sudden immersion in the theoretics of a foreign system of law before the reader obtains the initial basic foundation which will enable him to place the theoretical discussion in its proper perspective. Therefore, it is felt that these articles<sup>2</sup> have value as source material for the United States or Latin American lawyer.

Several of the articles reviewed do make a critical analysis of the system of law. One such article is "Military Penal Law and the Code of Military Justice of Chile" by Sergio M. Roman Vidal.<sup>3</sup> This author describes the system of military law in Chile within the context of the *Code of Military Justice of Chile*. The main theme of this article is the dual role of military penal law and the internal discipline the penal law generates within the armed forces. The protection such a system affords the State by protecting its military potential is constantly reiterated and intertwined to show the system's essentials and place it in a proper perspective. The author shows how this protection of Chile's military potential takes the form of protecting the military from the civilian authorities and from forces without the State.

The author shows the structure of his country's military law and also the branches of the Chilean military penal law. He points out the dichotomy which is inherent in the military penal law; that is, that such penal law is based within the general framework of the *Code of Military Justice* and must adhere to the normal and general principles of law as set out in the Code while, at the same time remaining a separate entity, creating its own separateness from the rest of the Code. This treatment of the penal law as a part of the whole, and yet at the same time independent of the Code's general propositions, intrigues the author, and a great deal of attention is paid to this duality. While not a new idea, the author's treatment is carefully explained and supports his original premise.

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<sup>2</sup> See, e.g., J. G. Sarmiento Nunez, *Organizacion, Jurisdiccion Y Competencia De Los Tribunales Militares De La Republica De Venezuela*, 2 *REVISTA ESPANOLA DE DERECHO MILITAR* 101 (1956); Roman Rodolfo Rivera, *La Justicia Militar En La Republica Argentina*, 10 *REVISTA ESPANOLA DE DERECHO MILITAR* 135 (1960). See also Gratien Gardon, *Organizacion Y Competencia De Las Jurisdicciones Militares Francesas*, 10 *REVISTA ESPANOLA DE DERECHO MILITAR* 153 (1960).

<sup>3</sup> Roman Vidal, *El Derecho Penal Militar Y El Codigo De Justicia Militar De Chile*, 8 *REVISTA ESPANOLA DE DERECHO MILITAR* 115 (1959).

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However, this article does not explore the Chilean penal law in great depth and, as the author admits, discusses the topic mostly in general terms. No attempt is made to reconcile this duality. The author exhibits the system rather than analyzes it. Yet, this reviewer feels that this article, by itself, has merit for the United States bar in that it takes the reader by the hand and introduces him to the subject matter in a clear and forthright manner, buttressing with facts the two roles of the penal law system and its dual interpretation within the Chilean Code.

In the next edition of the review, this same author does go into greater depth in explaining military crimes found in the Chilean *Code of Justice*.<sup>4</sup> This article begins by explaining the absence of definition in the Chilean Code as it relates to military crimes. The author points out that the Code defines the various crimes by discussing the crime itself rather than embracing a concept of military crime and then discussing the material aspects of the crime within this ambit. In short, it would seem that crimes pertaining to the military do not receive special treatment, and the definition of military crimes must conform to the general definition of crime as set out in Volume 1, Article 1, of the *Penal Code*. Yet as discussed in the previous article, military penal law also retains a separate identity within the Code despite its basic conformity to the Code's principles.

Because of this duality, the author explores the doctrinal concept of military crimes, setting out the various general principles that govern these crimes. He then discusses those crimes which inherently fall within the military penal framework and those which are ancillary or adjacent but which must necessarily be controlled through military tribunals. It is here that the "separateness" of military penal law is more clearly set out for the reader's benefit. The treatment of both concepts of military crimes, those inherently military and those tangential, is thorough and takes up the great majority of this article, including such topics as the requirement of obedience in the military and the special laws concerning various circumstances that become integrated and a part of the concept of culpability. In viewing this article together with its predecessor in the earlier review, these articles approached the type of article the common law lawyer would expect to find in a law review.<sup>5</sup>

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<sup>4</sup>Roman Vidal, *El Delito Militar En ElCodigo De Justicia Militar Chileno*, 9 REVISTA ESPAÑOLA DE DERECHO MILITAR 177 (1960).

<sup>5</sup>See also the article by the Auditor General of War of Chile, *Organizacion Y Competencia De Los Tribunales Militares Chilenos*, 4 REVISTA ESPAÑOLA DE DERECHO MILITAR 97 (1957).

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Another article of particular merit was "The Organization of Military Justice in Brazil" by Mario Tiburcio Gomes Carneiro.<sup>6</sup> The article is of particular interest to the United States lawyer in that it discusses the historical basis on which the *Code of Military Justice* and the *Military Penal Code* are founded.

By delving into the history of military justice within Brazil, the author shows how military law evolved into a special type of law as distinguished from the judicial power of the state. This special categorization arose not because the military was to be treated as a special class, as in the Middle Ages, but because the State recognized the uniqueness of military law, and therefore established a category of law with a separate identity.

The article discusses the fight by certain leaders in Brazil to have the system of military law and its tribunals covered in principle by the Brazilian Constitution. As a result of the efforts of these men and the books they published, military law and military tribunals were finally included in the 1946 Constitution. The author feels, however, that the precepts set out in the Constitution are not being strictly adhered to today by those applying the *Code of Military Justice* or the *Military Penal Code*. He feels that this has occurred primarily due to the lack of expertise by his countrymen in applying both these Codes.

At this point, the article sets out the organs of military justice in times of peace and in times of war, paying particular attention to the role of the Public Military Minister and the assimilation of military law into the regular legal framework of the country. The author feels that in many ways, the military law of Brazil has still to conform to the judicial power of the State, despite his belief that in defending an accused under Brazilian military law, the accused has sufficient protection in most cases and, in some instances, even better protections than those afforded his fellow countrymen under the civilian judicial power of the State. Once again, the author stresses that a more careful interpretation of the Constitution and the various codes will help to remedy the defects in the system.

The article ends with a discussion of the competency of the military tribunals in peace and war. It is at the end of that section that the author makes a plea for Brazil to follow the example of Spain and

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<sup>6</sup> Gomes Carneiro, *La Organizacion De La Justicia Militar En El Brasil*, 15 REVISTA ESPAÑOLA DE DERECHO MILITAR 93 (1963).

set up an institution similar to the Instituto Francisco de Vitoria, Sección de Derecho Militar, which will help to train the necessary specialists in this area of military law and also undertake investigations concerning the law that will properly relate it to the judicial power of the State.

International law is well covered in the reviews. The major thrust of the articles written in this broad area are the philosophical distinctions between what constitutes a "just" war as opposed to a "legal" war. One such article is by Antonio Pastor Ridruejo, "Contribution to the Study of the Humanitarian Law of War: Concept, Contents and Nature." <sup>7</sup>

This article follows the dictates of the humane law of war as enunciated by Kuna. The author argues that war is essentially a conflict between states and not between individuals, and that man is actually fighting man without any personal intention or desire to do so. For this reason, he feels a need for legalizing and protecting certain basic rights. He feels that the Geneva Conventions were very important in codifying these rights, and have created a minimum international standard which almost all nations will adhere to. He discusses the role of the Red Cross vis a vis the belligerents and the civilian population. He firmly believes that in the wars to come, the civilian population will be committed and there will be almost no differentiation between the civilians and the belligerents actually fighting on the battlefields. The article shows how the legal system created by the Geneva Convention works on the basis of reciprocity, but it also points out the author's belief that there are some rights that must go beyond the reciprocity of the Geneva Convention. Basic rights, according to the author, would include the aid or care for the wounded and the protection of non-participating civilian populations. According to this article, such protections would eliminate the superfluous attributes of war. The need for these added protections is the belief that the Geneva Convention will help in limiting war against the civilian population and against the belligerents only on the basis of what is necessary. It is because of this creation of a minimum standard of conduct that the author desires that the more sweeping concept of a humane law of war be superimposed onto the existing Geneva Convention. By stressing this humane approach to war rather than the mere legal requirements of the Geneva Convention, some sense of a super international force is created

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<sup>7</sup> Pastor Ridruejo, *Contribucion Al Estudio Del Derecho Humanitario Belico: Concepto, Contenido Y Naturaleza*, 7 REVISTA ESPANOLA DE DERECHO MILITAR 53 (1959).

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which transcends the existing international standard and imposes a higher standard than what is now legally acceptable. Further, this higher standard would also be applicable to internal wars as it is not restricted by legal limitations but is rather enlarged by moral considerations. The author is not directing his attack against war as such but rather is trying to create a standard that will help to limit it, especially as to its effect on civilian populations.

Another article that was quite good in this area is one written by Miyazaki and Wiegriinghaus, "The Protection of the Rights of Man in Case of War."<sup>8</sup> This article also talks in moral terms as distinguished from the legal minimums established by the Geneva Convention of 1949 and the Hague Conference. The authors feel that these agreements between nations are a step in the right direction but are not to be considered as the highest means of achieving concord in this area. Arguing along natural law principles, the article points out that there are laws and moral forces inherent in nature which compel nations to honor the rights of the human combatants in time of war. Reliance in this article is also placed on the concept that war is between states and not between individuals, which carries the authors towards the conclusion that as man is not culpable individually for the conflict, he should, therefore, be granted certain inherent rights and protections. No moral stigma is to be asserted to the individual combatant and therefore no penalty should be imposed.

Another noteworthy article in this area is by Dimitri S. Constantopoulos, "Just War and Legal War."<sup>9</sup> Although moral and supra-legal laws of war are discussed, the main thrust of the argument here is that "just" wars are essentially defensive in nature. All wars not defensive in nature are "unjust" and the author equates the term "unjust" with illegal. The bulk of this article goes into supporting this thesis, with references to man's awareness of the correctness of this position, as witnessed for example by the League of Nations and the Kellogg-Briand Pact.

These articles, as is evidenced by this brief view, are couched in abstract terms. The subject was treated primarily in philosophical terms, with little attempt made to find a solution to the problems or to suggest methods of weaving the various principles into the realities of war today. As far as they went, these articles are fine declarations of how men ought to behave in times of war and the reasons why they

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<sup>8</sup> Miyazaki and Wiegriinghaus, *La Proteccion De Los Derechos Del Hombre En Caso De Guerra*, 9 REVISTA ESPANOLA DE DERECHO MILITAR 9 (1960).

<sup>9</sup> Constantopoulos, *Guerra Justa Y Guerra Legal*, 2 REVISTA ESPANOLA DE DERECHO MILITAR 9 (1956).

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are required to do so. However, this reviewer would have been more interested in an attempted solution or at least a different point of view as to means of reconciling ideals to practicalities.

The articles discussed in this review are but a few of the many fine articles to be found in the *Revista Espanola de Derecho Militar*. They cover a wide range of topics within the area of international and comparative law. For those who read Spanish and who are interested in another viewpoint concerning the international and comparative legal questions of our time, this reviewer strongly recommends these reviews and believes that they will be of significant value.

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